APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

NO. 376

DUNBAR-STANLEY STUDIOS, INC.,
a Corporation,
Appellant,

vs.

STATE OF ALABAMA,
Appellee.

APPEAL FROM THE SUPREME COURT OF ALABAMA

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

DOCKETED AUGUST 5, 1968

PROBABLE JURISDICTION NOTED OCTOBER 14, 1968

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DOCKET ENTRIES IN THE CIRCUIT COURT FOR THE FIFTEENTH JUDICIAL CIRCUIT OF ALABAMA (MONTGOMERY COUNTY).

Dunbar-Stanley Studios, Inc., Appellant,
vs.
State of Alabama, Appellee.
} In Equity No. 36887.

June 8, 1966	Notice of Appeal from License Tax Assessment.
June 8, 1966	Security for Costs of Appeal.
July 14, 1966	Bill of Complaint.
July 19, 1966	Answer to Bill of Complaint.
Jan. 6, 1967	Order of Submission.
Jan. 6, 1967	Note of Submission.
March 14, 1967	Final Decree.
March 20, 1967	Notice of Appeal by Dunbar-Stanley Studios and Security for Costs.
March 21, 1967	Notice of Appeal issued to State of Alabama.
March 21, 1967	Certificate of Appeal.
May 1, 1967	Decree Extending Time for Filing Transcript in Supreme Court.
June 28, 1967	Decree of Supreme Court Extending Time for Filing Transcript.
July 7, 1967	Transmit Record to Supreme Court.

DOCKET ENTRIES IN THE SUPREME COURT OF ALABAMA.

Certificate of Appeal—Filed March 22, 1967.

Record— Filed July 18, 1967.

April 10, 1967	Motion to Consolidate with 1st Div. 431.
April 17, 1967	Motion Denied.
August 18, 1967	Submitted on Briefs.
March 1, 1968	Transferred to Simmons
May 13, 1968	Affirmed.

From: The Circuit Court of Montgomery County,
In Equity.

Dunbar-Stanley Studios, Inc.,
Appellant,
vs.
State of Alabama,
Appellee.
} Docket No. 36,887.

Solicitors for Appellant
Thornton and McGowin,
713 Merchants National Bank Building,
Mobile, Alabama.

Solicitors for Appellees
Hon. MacDonald Gallion, Attorney General,
Capitol,
Montgomery, Alabama.
Hon. William H. Burton, Assistant Attorney General,
Capitol,
Montgomery, Alabama.

BILL OF COMPLAINT.

Comes now Dunbar-Stanley Studios, Incorporated, a corporation, Appellant in the above styled cause, and shows unto this Court:

1. Appellant is a corporation organized and existing under the laws of the State of North Carolina. The Appellee is the sovereign State of Alabama.

2. On, to-wit, the 19th day of May, 1966, the State Department of Revenue made final assessments against Appellant for licenses imposed by Title 51, Section 569, Code of Alabama, as appears from the Transcript filed in this cause.

3. Prior to February, 1965, Appellant operated as a partnership, and the State Department of Revenue made final assessments against the partnership for licenses under section 569 of the Code for the period prior to the assessment against Appellant, as follows:

April 1, 1963 through September 30, 1965

State	$220.00
Counties	110.00
Penalties	49.72
Interest	48.35
Citation Fees	66.00
Issuance Fees	28.00
	$522.07

4. During all time here pertinent Appellant has been and is now engaged exclusively in interstate commerce for which it is not now liable to Appellee for the licenses claimed here or for any other license, in this:

(a) Appellant maintains no permanent or temporary office in the State of Alabama; Appellant owns no property in the State of Alabama, other than that which is brought in and out of the State by the photographers herein described; Appellant maintains no inventory or supplies in the State of Alabama other than those in the possession of the photographer; and Appellant maintains no permanent agent or employee in the State of Alabama.

(b) Appellant has no agents, servants or employees who take photographs in the State of Alabama who are residents of the State of Alabama.

(c) Appellant is engaged in the photography business with its principal office in Charlotte, North Carolina, specializing in children's photographs, under the trade name "Pixy Pin-Ups."

(d) J. C. Penney Company is engaged in business operating department stores in 47 states and in approximately 1500 communities, including in Alabama, the Cities of Decatur, Jasper, Mobile, Prichard, Andalusia, Birmingham, Anniston, and Dothan.

(e) Prior to the events set out in this appeal, J. C. Penney Company entered into an agreement with Appellant whereby Appellant did and still does the photography work of children in the stores of J. C. Penney Company. The method of operation provided by the agreement and the way Appellant acted in this case was:

(1) Photographers employed by Appellant, non-residents of Alabama, were at the disposal of the local Penney stores. The local store manager requested Appellant to send representatives for picture taking on specified dates. Depending on the size of the store and the population of the locality, these visits might vary from one to five times a year. Each visit lasted from two to five days. The visits to some of the cities were:

Decatur—August 30, 31, 1965, November 15, 16, 1965.
Mobile—January 12-16, 1965, March 16-20, 1965, June 8-12, 1965, August 17-21, 1965, October 12-16, 1965.
Andalusia—July 7-10, 1965, November 23-27, 1965.
Anniston—January 24-26, 1966.

A copy of a promotional sheet notifying the public of Appellant's activities entitled "Let's Get Acquainted" is attached hereto marked Exhibit A and by reference made a part hereof.

(2) Advertising for this visit was handled by the J. C. Penney Store, which store also took the orders for pictures, handled all money, and delivered the pictures to the customers when they were completed.

(3) Appellant's photographer took the pictures at the local J. C. Penney store, and returned the exposed film

to the home office of Appellant where they were developed, printed and finished. All orders are subject to final acceptance by the home office in Charlotte, North Carolina.

(4) After the pictures were finished, they were returned to the local J. C. Penney store, where they were paid for and picked up by the customers. The payments were made to the J. C. Penney Company store and not to Appellant or Appellant's photographers or agents.

(5) For its services in taking, developing, printing, finishing and producing pictures, Appellant was paid a percentage of the receipts from the J. C. Penney stores.

(6) The arrangements for the visits by Appellant's photographers and the advertising of the visits are handled and paid for by the local employees of the J. C. Penney stores. The solicitation of the sittings, and the location on the premises are made by local employees of the Penney store. The collection of the cost of the pictures and delivery thereof are all handled by the local employees of Penney.

(7) Appellant's activities are limited to taking pictures of persons obtained by Penney, at times and places arranged by Penney, and then transmitting the exposed film to Charlotte, North Carolina. Appellant has no further activity in Alabama with reference to these pictures. The only other activity of Appellant with reference to the picture is to develop, print, finish and mail the finished picture from Appellant's plant to the local Penney store.

(8) J. C. Penney Company has not now nor at any time involved in this suit, any photographic equipment or photographers in the State of Alabama. It does not offer any photographic service for compensation or otherwise in the State of Alabama except that of Appellant.

Prayer for Relief.

Wherefore, Premises Considered, Appellant prays that upon final hearing hereof that this Court hold:

1. That Appellant is not liable for the license imposed by said assessment,

2. That Appellant is engaged in interstate commerce,

3. That imposition of said license to the activities of Appellant violates the provision of the Federal Constitution including the commerce clause,

4. Such other, further and additional relief to which Appellant may be entitled in the premises.

Thornton & McGowin,
Solicitors for Appellant.

Filed July 14, 1966.

(Certificate omitted.)

(Exhibit omitted.)

ANSWER.

Comes the Appellee, State of Alabama in this cause, and acting by and through its lawful attorneys, answers the Bill of Complaint filed herein by the Appellant and each and every paragraph and part thereof, separately and severally, as follows:

1. Appellee admits the allegations of paragraph numbered "1" of the Bill of Complaint.

2. Appellee admits the allegations of paragraph numbered "2" of the Bill of Complaint, and Appellee has attached a copy of said final assessments to this Answer as Exhibit "I" thereto, and as a part thereof. And in further answer to paragraph numbered "2" Appellee admits that the Appellant has duly and timely appealed said final assessments to the Circuit Court of Montgomery

County, Alabama, in Equity, under the provisions of Title 51, Section 140, Code of Alabama 1940, and has paid the tax involved in lieu of making a supersedeas bond for the purpose of taking said appeal, and has also filed a cost bond therein.

3. Appellee admits the allegations of paragraph numbered "3" of the Bill of Complaint.

4. Appellee specifically denies the allegations contained in paragraph numbered "4" of the Bill of Complaint to the effect that the Appellant has been and is now engaged exclusively in interstate commerce for which it is not liable to Appellee for license taxes claimed under the assessment or for any other license, and further avers that said allegations of said paragraph are both untrue and incorrect.

(a) In answer to subparagraph (a) of paragraph "4" of the Bill of Complaint, Appellee says that it is without sufficient knowledge, information or belief either to admit or deny the allegations of said subparagraph, and for that reason denies same and demands strict proof thereof.

(b) In answer to subparagraph (b) of paragraph "4", Appellee says that it is without sufficient information, knowledge or belief to either admit or deny the allegations of said subparagraph, and for said reasons it denies same, and demands strict proof thereof.

(c) In answer to subparagraph (c) of paragraph "4" Appellee admits the allegations of said subparagraph.

(d) In answer to subparagraph (d) of paragraph "4" of the Bill of Complaint, Appellee admits the allegations of said subparagraph, but also alleges that the J. C. Penney Company also has a store in Montgomery, Montgomery County, Alabama.

(e) In answer to subparagraph (e) of paragraph "4" of the Bill of Complaint, Appellee admits that the Ap-

pellant's photographers took the pictures and photographs in the J. C. Penney Company stores located in Mobile and elsewhere in Alabama, and that its photographic work in this respect is limited to the taking of pictures and photographs of children. However, Appellee is without sufficient knowledge, information or belief concerning the alleged fact that the Appellant had entered into an agreement with the J. C. Penney Company concerning the taking of such photographs, and for that reason denies this specific allegation, and demands strict proof thereof.

(1) In answer to subparagraph (e), (1) of paragraph "4" of the Bill of Complaint, Appellee admits that the photographers used to take the pictures or photographs are employees of the Appellant, but Appellee denies that said photographers are nonresidents of Alabama, and were at the disposal of the local Penney's stores. Appellee also admits that specific dates were set for the taking of the pictures or photographs by Appellant's photographers in said local J. C. Penney stores. However, Appellee denies that the photographers were sent to the local J. C. Penney stores at the request of the store managers or representatives of J. C. Penney. Appellee also admits that specific dates were set for the taking of the pictures or photographs by Appellant's photographers in said local J. C. Penney stores. However, Appellee denies that the photographers were sent to the local J. C. Penney. Appellee admits that specific dates were set for the taking of the pictures or photographs by the Appellant's photographers in said local J. C. Penney stores, depending on the size of the store and the population of the locality, and that such visits by the photographers varied from one to five times a year, and that each visit lasted from two to five days. Appellee also admits the remainder of the allegations made by the Appellant in said subparagraph (3), (1) of paragraph "4", but says that such averments are incomplete in that it is not shown on what dates the pho-

tographers took the pictures at the J. C. Penney store located in Montgomery, Montgomery County, Alabama.

(2) In answer to subparagraph (e), (2) of paragraph "4" of the Bill of Complaint, Appellee says that it is without sufficient knowledge, information or belief to either admit or deny the allegations of said subparagraph, and for that reason same are denied, and strict proof is required thereof.

(3) In answer to the allegations made by the Appellant in subparagraph (e), (3) of paragraph "4" of the Bill of Complaint, Appellee admits the allegations of said subparagraph.

(4) In answer to subparagraph (e), (4) of paragraph "4", the Appellee says that it is without sufficient knowledge, information or belief to either admit or deny the allegations of said subparagraph, and for that reason demands strict proof thereof.

(5) In answer to subparagraph (e), (5) of paragraph "4" of the Bill of Complaint, Appellee says that it is without sufficient knowledge, information or belief to either admit or deny the allegations of said subparagraph, and for that reason demands strict proof thereof.

(6) In answer to subparagraph (e), (6) of paragraph "4" of the Bill of Complaint, Appellee says that it is without sufficient knowledge, information or belief to either admit or deny the allegations of said paragraph, and for said reasons the Appellee demands strict proof thereof.

(7) In answer to subparagraph (e), (7) of paragraph "4" of the Bill of Complaint, Appellee says that it is without sufficient knowledge, information or belief to either admit or deny the allegations of said paragraph, and for said reasons the Appellee demands strict proof thereof.

(8) In answer to subparagraph (e), (8) of paragraph "4" of the Bill of Complaint, Appellee denies the allegations of said subparagraph.

And in further answer to the Bill of Complaint, Appellee denies that the license tax involved is under the circumstances as alleged in the Bill of Complaint directed in any respect at interstate commerce or that it places a burden on interstate commerce, in that our State Supreme Court has held on, not one, but two separate occasions that this particular license tax as levied under Title 51, Section 569, Code of Alabama 1940, Recompiled 1958, on transient or traveling photographers, is directed at the photographer and at the activity of the photographer in taking the picture or photograph in Alabama, which is a local event taking place entirely in Alabama, and which can be realistically separated from the company's other activities which might take place in interstate commerce, and that the license as so levied and applied on such traveling photographers who come from without the State is valid and lawful and does not offend the Commerce Clause of the Federal Constitution.

And in further answer to the Bill of Complaint, Appellee says that the contentions made by the Appellant herein, and issues involved in this cause, have already been decided and resolved against the Appellant, in not one, but two separate cases which represent the latest and last pronouncement on the same subject matter by our State Supreme Court, namely, **Graves v. State**, 258 Ala. 359, 62 So. 2d 446, and **Haden, Commissioner of Revenue v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388, and that this case already stands decided against the Appellant and to the effect that it is duly and lawfully required to pay the transient photographer's license tax under the circumstances; thus, the doctrine of stare decisis is clearly applicable.

Wherefore, Premises Considered, your Appellee prays that this Honorable Court will upon final submission of this cause enter a judgment and final decree in favor of the Appellee and against the Appellant affirming in all respects said final assessments of license tax, and will tax the costs of said cause against the Appellant.

/s/ Richmond M. Flowers,
Richmond M. Flowers,
Attorney General,
State of Alabama,

/s/ Willard W. Livingston,
Willard W. Livingston,
Counsel, Department of Revenue and
Assistant Attorney General,
State of Alabama,

/s/ Wm. H. Burton,
William H. Burton,
Assistant Counsel, Department of
Revenue, and Assistant Attorney
General,
State of Alabama,

Solicitors for the Appellee.

Filed July 19, 1966.

(Certificate omitted.)

(Exhibits omitted.)

[1*] TRANSCRIPT OF PROCEEDINGS.

In the Circuit Court of Montgomery County, Alabama.

In Equity.

Dunbar-Stanley Studios, Incorporated, a Corporation,
Appellant,
vs.
State of Alabama,
Appellee.
Case No. 36887.

Before: Hon. Richard P. Emmet, Circuit Judge, 15th Judicial Circuit of Alabama, at the Court House, Montgomery, Alabama, Friday, January 6th, 1967.

Appearances:

For the Appellant: Messrs. Thornton and McGowin, Attorneys at Law, Mobile, Alabama. By: J. Edward Thornton, Esq.

For the Appellee: Hon. Richmond M. Flowers, Attorney General, State of Alabama. Hon. Willard W. Livingston, Counsel, Department of Revenue and Asst. Attorney General, State of Alabama. By: Hon. William H. Burton, Asst. Counsel, Department of Revenue, and Asst. Attorney General, State of Alabama.

[2] Mr. Burton: If the Court please, actually, we have two cases here. The case that is going to be tried is Case No. 36887. It is styled Dunbar-Stanley Studios, Incorporated vs. The State of Alabama. Now, the other case is No. 36886 and we have an agreement, as I understand it, and if I am wrong, I want Mr. Thornton to correct me on this, that this case No. 36887 will be tried.

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* Numbers appearing in text in brackets indicate page numbers of original stenographic transcript of testimony found in upper left hand margin in transcript of record.

Mr. Thornton: That's correct.

Mr. Burton: But that the decision in this case will also be governing as to the disposal of Case No. 36686.

Mr. Thornton: That is correct.

Mr. Burton: We are just going to try this one case, and let it also govern the other case. Now, that is No. 36687 that will be tried. Now, Case No. 36687 involves the license year of 1963. There are two assessments——

Mr. Thornton: That's right. One is against the partnership and one is against the corporation.

Mr. Burton: Yes, and the first year there is 1963 through 1964, license tax year. The next one is the 1964 and 1965 tax period. There are two separate tax years involved and this case having the first number I presume that it is the 1963-1964 year, even although the complaint combines both years and both assessments. Now, the 1963-1964 assessment is in the total amount of $225.84 and it covers the period from October 1st, 1963 through September 30th, 1964. It is for the photographer's license under Sec. 569 under Title 51 and in it this particular case is confined to what we call the transient photographer's license and you will find that in the very last sentence of Sec. 569. That statute covers a photograph gallery but we are not concerned here with a photograph gallery, although that is the name of the statute it is all inclusive and says photographers and photograph galleries but we are concerned here only with the last sentence there and that is the transient dealers license or transient photographers license as it is stated in that last sentence and it is a $5.00 a week license. Now, the assessment year of this year covers nineteen various counties in which these photographers belonging to this company or associated with this company have allegedly taken pictures in certain J. C. Penney Stores. In other words, this is kind of an arrangement between Dunbar-Stanley [3] and the J. C. Penney Stores and this will be enumerated on in the evidence. We have made these assessments for the activities

of these photographers in taking pictures in these nineteen various counties and the J. C. Penney Stores located in those counties, and we have assessed them so much per week as manifested by the assessment for their activities under this license law in those counties. Briefly, that is what this case is about without getting into the law at this time.

The Court: I see. You are levying the tax under Sec. 569, and it is the contention of the taxpayer that it being in interstate commerce that the State of Alabama has no jurisdiction.

Mr. Thornton: That's correct.

The Court: Now, do we need to take a little testimony?

Mr. Thornton: Yes, sir.

Mr. Burton: Now, let me ask one question, Your Honor. Do you want any more on the assessment? Do you want me to put the assessment in evidence?

Mr. Thornton: Not necessarily.

Mr. Burton: Well, all right, but you admit that the assessment was made, do you not?

Mr. Thornton: Oh, yes.

Mr. Burton: You are denying the correctness, of course, and the validity but you do admit that the assessment has been made as I have stated by the State Department of Revenue.

Mr. Thornton: Yes.

Mr. Burton: But you are just denying the validity thereof.

Mr. Thornton: Yes.

Mr. Burton: All right, then. We will just stand on that statement that the assessment has been made in the amount of $225.84 through the 1963-1964 tax year covering these alleged nineteen different counties where their photographers are said to have taken pictures in the J. C. Penney Stores.

The Court: All right. You may proceed with the first witness, Mr. Thornton.

[4] **STANLEY LIVINGSTON HOKE,** having been duly sworn, was called as a witness for the Appellant, and testified as follows:

Direct Examination, by Mr. J. Edward Thornton.

Q. What is your name, sir? A. Stanley Hoke.

Q. Where do you live, Mr. Hoke? A. I live in Charlotte, North Carolina.

Q. Now, Mr. Hoke, an assessment out of which this case arose was against S. L. Hoke and N. C. Holden, a partnership, doing business as the Dunbar-Stanley Studios. Are you familiar with that organization? A. Yes, sir.

Q. What is it? What was it? A. Yes, was is the correct term. It is no longer a partnership. It was a photographic organization making pictures in forty-eight states.

Q. Who was S. L. Hoke in that partnership? A. That was me.

Q. You were one of the partners in that partnership? A. That is correct.

Q. Now, the Dunbar-Stanley Studios, Incorporated, a corporation, what is that? A. That is a wholly owned corporation owned by myself. Mr. Holden is not a member of that. The corporation has bought out his partnership and formed a corporation effective a little better than a year ago.

Q. Now, what business is it engaged in? A. It is engaged in the business of making photographs both in the United States and in Europe.

Q. What is your connection with it? A. President.

Q. All right. Now, Mr. Hoke, if you will refer to the Bill of Complaint in this case possibly we can expedite the facts in the case. A. If I can see through these dime store glasses, I will.

Mr. Burton: Well, that's all right. Your Honor, I don't [5] many of the facts are actually in dispute. There might be one phase there in dispute but I have no objections if it will expedite it to his going right on down the line and

reading them except that there is one possible phase of dispute which we have discussed.

The Court: All right. You may proceed.

By Mr. J. Edward Thornton: (Continuing).

Q. All right. Mr. Hoke, the first paragraph there, the paragraph with reference to the incorporation and the capacity of the State of Alabama—that has been admitted and so no testimony will be necessary on that. Now, Section 2 relates to the fact that an assessment was made against the Appellant here and that has also been admitted, and, so, I take it, we do not need testimony on that. The third section does the same thing in setting out the amount of the assessment and that has been admitted and so we do not need any testimony on that. Now, Section 4 recites how the business was done by the Appellant and by the Appellant we mean Dunbar-Stanley Studios, Incorporated, a corporation. Now, Subsection (a) under Paragraph No. 4 says as follows: "Appellant maintains no permanent or temporary office in the State of Alabama; Appellant owns no property in the State of Alabama, other than that which is brought in and out of the State by the photographers herein described; Appellant maintains no inventory or supplies in the State of Alabama other than those in the possession of the photographer; and Appellant maintains no permanent agent or employee in the State of Alabama." Now, Mr. Hoke, is that true or false? A. That is true.

Q. Now, Subsection (b) says, "Appellant has no agents, servants or employees who take photographs in the State of Alabama who are residents of the State of Alabama." Is that true or false, sir? A. That is true.

Q. Now, Subsection (c) says, "Appellant is engaged in the photography business with its principal office in Charlotte, North Carolina, specializing in children's photographs, under the trade name 'Pixy Pin-Ups.'"

Mr. Thornton: Well, I believe that has been admitted, has it not?

Mr. Burton: Yes, that is admitted.

[6] By Mr. J. Edward Thornton (Continuing).

Q. The next section is Subsection (d) "J. C. Penney Company is engaged in business operating department stores in forty-seven states and in approximately fifteen hundred communities, including in Alabama, the Cities of Decatur, Jasper, Mobile, Prichard, Andalusia, Birmingham, Anniston, and Dothan." Now, sir, is that true? A. Yes, that's true with a limited—they operate in more cities than this.

Q. But they do operate in those cities, do they not? A. Yes, that is correct.

Q. That is the J. C. Penney Stores do? A. Yes.

Q. Now, Subsection (e) says, "Prior to the events set out in this appeal, J. C. Penney Company entered into an agreement with Appellant, whereby Appellant did and still does the photography work of children in the stores of J. C. Penney Company. The method of operation provided by the agreement and the way Appellant acted in this case was: (1) Photographers employed by Appellant, nonresidents of Alabama, were at the disposal of the local Penney stores. The local manager requested Appellant to send representatives for picture taking on specified dates. Depending on the size of the store and the population of the locality, these visits might vary from one to five times a year. Each visit lasted from two to five days. The visits to some of the cities were: Decatur, August 30th, 31st, 1965, November 15th, 16th, 1965. Mobile, January 12th-16th, 1965, March 16th-20th, 1965, June 8th-12th, 1965, August 17th-21st, 1965, October 12th-16th, 1965. Andalusia, July 7th-10th, 1965, November 23rd-27th, 1965. Anniston, January 24th-26th, 1966. A copy of a promotional sheet notifying the public of Appellant's activities entitled 'Let's Get Acquainted' is attached hereto marked Exhibit A and by reference made a part hereof." Now, Mr. Hoke, is that a true statement of fact? A. Substantially. I can't verify these dates. I think that this sheet that we are talking about——

Mr. Burton: We will admit the dates of it. We don't dispute those dates and we will admit them.

The Witness: Where it says there, "A copy of a promotional sheet notifying the public of Appellant's activities entitled 'Let's Get [7] Acquainted', I just want to point out that this is not a promotional sheet. The way we actually notify the public that we are going to be there is by a newspaper ad. This sheet goes to the people when they come back to the store and they receive their photographs. They just get this to take home notifying them about our organization. However, that's after the fact, shall we say. This is not so much a promotional sheet and this sheet actually no longer exists.

By Mr. J. Edward Thornton (Continuing).

Q. Well, was it until about the time we—— A. Yes, we did. It went in our envelopes at the time but our promotion was done by the newspaper.

Q. All right. Now, the next section of this Bill of Complaint, Mr. Hoke, says—it is No. 2 on page 3, and it says, "Advertising for this visit was handled by the J. C. Penney Store, which store also took the orders for pictures, handled all money, and delivered the pictures to the customers when they are completed." Now, sir, is that true or false? A. That is correct.

Q. All right. Now, the next section, No. (3) has been admitted and it says, "Appellant's photographer took the pictures at the local J. C. Penney store, and returned the exposed film to the home office of Appellant where they were developed, printed and finished. All orders are subject to final acceptance by the home office in Charlotte, North Carolina." Now, that section has been admitted and we will need no testimony as to that. Now, let's see about the next one. The next one is No. (4). It says, "After the pictures were finished, they were returned to the local J. C. Penney store, where they were paid for and

picked up by the customers. The payments were made to the J. C. Penney Company store and not to Appellant or Appellant's photographers or agents." Now, is that true or correct? A. That is correct. We had no agents to go to the store. Only photographers.

Q. All right. Now, on the next page, Page 4, Subsection (5) says, "For its services in taking, developing, printing, finishing and producing pictures, Appellant was paid a percentage of the receipts from the J. C. Penney stores." Now, Mr. Hoke, will you explain the way that was handled with reference to [8] that percentage? Who gets the percentage is what I am asking you. A. Well, going back to 1953 when we entered into our agreement with the Penney Company, we agreed to take photographs throughout all of their stores throughout the United States. We send only a photographer into the town and the photographer makes the photographs and sends the films back to Charlotte, North Carolina, as we stated and they later then come to the store as completely finished photographs. It is not a proof or something that the customer orders from. In other words, when the pictures come immediately back from our finishing plant, that is a finished product. When the customer comes into the store they pick up from the store their finished pictures and whatever they want they pay for at that particular time after the initial payment which entitles them to one picture. When this thing is finalized at the end of the week or ten days or whatever time it takes the customers to come by and pick up their pictures at the store, we are sent a sum of money representing the amount of money that the customers paid less the advertising cost that the store paid and less the commissions that we have agreed on in our relationship with Penney Company. Maybe we say we get a commission or Penney Company says that they get a commission and it just depends on which side of the fence we are on.

Q. All right. What is the commission that the Penney Company is paid, sir? What is the amount of the commission? A. It is twelve and one half per cent.

Q. Is that based on a gross figure or a net figure? A. That is based on a net figure.

Q. Well, isn't it gross? A. Well, after advertising comes out.

Q. Well, I thought it came out before the advertising? A. No, I don't think so. Maybe it could and maybe I'm wrong.

Q. Well, it is your business, sir, and I am not trying to tell you—— A. Well, it could be on the gross figure but I thought—that's right. You are correct. They pay us twelve and a half per cent on the gross.

Mr. Burton: May we go off the record for a minute, Your Honor?

The Court: Yes, sir.

(Off the record discussion between Court and counsel.)

[9] **Direct Examination:** (Continued), by Mr. J. Edward Thornton.

Q. Now, Mr. Hoke, I show you three documents here and I will ask you to tell us what those are. Who printed those forms I have reference to? A. These forms were forms that were made by the Penney Company in their accounting department in New York and we printed these.

Q. You printed the forms and furnished them to the Penney Company. Isn't that correct? A. Yes, according to their specifications and we send these to the stores and this is called a Cashier's Report for the Penney Company to account not only to us about the photographic transactions but also to their New York office. All of our accounting goes into the New York office through duplicate accounting.

Q. All right. Now, those are each a duplicate. What store did they relate to exactly? A. This store here was in Mobile, Alabama.

Q. And they related to a visit by your representative to the store in Mobile, Alabama, is that correct? A. That's correct.

Q. Now, to direct your attention specifically to one little item in the upper right hand corner and to answer specifically the question as to whether the twelve and one half per cent is gross or net—that shows you the gross receipts and then shows you less twelve and one half per cent of column No. 1 and I believe that Column No. 1 is gross receipts, is it not? A. Yes, sir. That is correct.

Q. Now, the twelve and one half per cent goes to the Penney Company. A. That is correct.

Q. Then, the Penney Company pays off all of the expenses and then the balance is remitted to—— A. Less advertising costs here. That's correct.

Q. And this printed form here shows the exact way that the Penney Company and Dunbar-Stanley are and have been operating for some while during all of the time that is involved in this case? A. That's correct.

Mr. Thornton: We would like to offer these three documents [10] into evidence to illustrate the way the accounting is done between the parties.

Mr. Burton: We have no objection.

The Court: All right. Received without objections.

(Whereupon, One Pixy Pin-Ups Cashier's Report, marked Appellant's Exhibit No. 1 for identification, was received in evidence and a photostatic reproduction of same is set out hereinafter.)

(Whereupon, One Pixy Pin-Ups Cashier's Report for the Period of November, marked Appellant's Exhibit No. 2 for identification, was received in evidence and a photostatic reproduction of same is set out hereinafter.)

(Whereupon, One Pixy Pin-Ups Cashier's Report, marked Appellant's Exhibit No. 3 for identification, was received in evidence and a photostatic reproduction of same is set out hereinafter.)

Direct Examination: (Continued), by Mr. J. Edward Thornton.

Q. Mr. Hoke, the next paragraph in the Bill of Complaint which is on Page No. 4 of the Bill of Complaint, Paragraph No. (6) says, "The arrangements for the visits by Appellant's photographers and the advertising of the visits are all handled and paid for by the local employees of the J. C. Penney Stores. The solicitation of the sittings, and the location on the premises are all made by local employees of the Penney store. The collection of the cost of the pictures and delivery thereof are all handled by the local employees of Penney." Now, sir, is that true or false? A. That is substantially true.

Q. Now, Mr. Hoke, I show you these three cards and would you tell us what they are? A. These are Reservation Request Cards. We send these cards with a letter to the store and tell them to use these cards to request our services at a particular date and, as you can see, to give us alternative dates. We [11] have three choices. It merely means that the store could give us the three dates that they pick out. This is done usually very heavily at the first of the year and we try to set this up according to the store's desires. They usually want this thing when they are not so busy and not always can we fill these dates but we try hard to do it.

Q. And these three that I have handed you are actually reservation requests that were mailed and sent to Dunbar-Stanley? A. That is correct. There is one from Andalusia, one from Opelika and one from Decatur.

Q. Now, I show you a photostatic copy of three others. Are they the same thing? A. That is correct. In fact, they all have their alternative dates here.

Mr. Thornton: We offer these in evidence, if the Court please.

The Court: All right. Let them be marked by the Reporter. Any objections?

Mr. Burton: No objections.

The Court: All right. Received without objections.

(Whereupon, a Photostatic Reproduction of Three Reservation Requests dated November 24th, 1965, November 24th, 1965 and December 13th, 1965, marked Appellant's Exhibit No. 4 for identification, were received in evidence and a photostatic reproduction of same is set out hereinafter.)

(Whereupon, One Reservation Request, dated November 10th, 1966, marked Appellant's Exhibit No. 5 for identification, was received in evidence and a photostatic reproduction of same is set out hereinafter.)

(Whereupon, One Reservation Request, dated November 17th, 1966 marked Appellant's Exhibit No. 6 for identification, was received in evidence and a photostatic reproduction of same is set out hereinafter.)

[12] (Whereupon, One Reservation Request, dated November 7th, 1966, marked Appellant's Exhibit No. 7 for identification, was received in evidence and a photostatic reproduction of same is set out hereinafter.)

Direct Examination (Continued),
by Mr. J. Edward Thornton.

Q. Mr. Hoke, I show you here a handful of additional Reservation Requests. Are these all the same sort of thing that we have just introduced into evidence? A. That is correct. They are about the same.

Q. Now, Mr. Hoke, the next paragraph in the Bill of Complaint on Page No. 4 is Paragraph (7) and it says, "Appellant's activities are limited to taking pictures of

persons obtained by Penney, at times and places arranged by Penney, and then transmitting the exposed film to Charlotte, North Carolina. Appellant has no further activity in Alabama with reference to these pictures. The only other activity of Appellant with reference to the picture is to develop, print, finish and mail the finished picture from Appellant's plant to the local Penney store." Is that true or correct, sir? A. That is true. That's exactly true.

Q. Now, the next paragraph is Paragraph No. (8) and it says, "J. C. Penney Company has not now nor at any time involved in this suit, any photographic equipment or photographers in the State of Alabama. It does not offer any photographic service for compensation or otherwise in the State of Alabama except that of Appellant." Is that true or false? A. That is true.

Q. All right. No further questions.

Cross-Examination, by Mr. William H. Burton.

Q. Mr. Hoke, in regard to these counties in which your photographers have operated here in the J. C. Penney Stores that have taken these Pixy pictures I believe that we found from your records that there are some nineteen counties that were involved during this 1963-1964 tax or license year. Is that correct? There are some nineteen locations or Penney Stores involved where your photographers did take these pictures? [13] A. I could not say categorically that that is correct. I would assume it is. I have no actual count with me. I imagine there are that many locations in the State of Alabama in which we do photographic work. It seems to be a little high to me. I didn't know we have done that well.

Q. But our agents who made the audit did find, that's what they tell me, from your records that there were nineteen such locations in Alabama. A. I believe that would be very close to correct.

Q. In nineteen different counties. Now, I believe Mr. Thornton in his Complaint—he names Decatur, Mobile, Andalusia and Anniston as some of these locations and I believe he named Jasper, Mobile, Prichard and Andalusia, Birmingham, Anniston and Dothan. I might have repeated some of them. I believe that Montgomery is also involved. Is that correct. A. It could be. It seems to me that we had this local store that hasn't used our services for some time but I am pretty sure that back at that time they did.

Q. In other words, the ones named in the Complaint, while it is correct that these services were performed in those stores at those localities, there were some others that were not named. A. I would believe that would be probably correct. I don't know. I cannot affirm or deny that. Actually, I don't know how many Penney Stores there are in the State of Alabama. I have a list, however, and if I can find it, I can tell you real quick.

Q. But this service was rendered. This Pixy photographic service was rendered by your photographers in all of the J. C. Penney Stores in Alabama. Is that correct? A. No. Not all of the stores in the State of Alabama. For instance, Florence, Alabama has a Penney Store but they do not use our services.

Q. But it was in most of them, was it not? A. Yes, sir. I would say in the majority of them.

Q. Now, these photographers, there is no question but that they were your employees that were sent to these various stores in Alabama, the various Penney Stores. They were your photographers, were they not? A. Definitely. Yes, sir.

Q. Of course, when I say you, I mean Dunbar-Stanley photographers. A. Correct.

[14] Q. Now, when they went to these localities and in performing this service they did take pictures, did they not? I believe you call them the Pixy Pin-Up Pictures? A. That's correct.

Q. And with their cameras they did take the negative, I guess you would call it, and—— A. They exposed the negative. Yes, sir,

Q. After they took the exposure there at the local Penney Store, did they send the negative into your—I believe your office is located in Charlotte, North Carolina. Is that correct? A. That is correct.

Q. Did the Photographers send the negatives in after taking the pictures to your office? A. Yes. They mailed the exposed undeveloped film to Charlotte, North Carolina for development.

Q. Then, I believe, you made the prints there, developed the negatives and made the prints there in Charlotte, North Carolina. A. That is correct.

Q. At your plant. A. Correct.

Q. Now, when those prints were made were they sent back to the various Penney Stores? Just what happened after the prints were made? A. After the prints were processed and after the organization decided that they were good enough to fill the bill in the town—this is an individual case in each customer's point—if they are not satisfactory then the money is refunded by the store, but substantially we send all the pictures back to the J. C. Penney Company in one big package or in two or three packages depending upon the amount of time we stay and then those are shown to the customers by a regular J. C. Penney employee who is employed in the store. For instance, they usually use the girl in the Lay-Away Department or something of that sort and these are put out in front of the customers and they take what they want. Now, if the pictures are bad and we shoot—sometimes this occurs—and there is a streak or a scratch—and we have to discard the pictures and we can't satisfy the customer then we contact the store with this customer's name and a refund is made and [15] then the next time the customer comes into the store they get a free photograph

In spite of the fact that a refund has been made because of the trouble they went to without getting a picture.

Q. Well, most of them I have seen, and I am going to be frank with you, have been very fine pictures. A. Thank you.

Q. However, that's not the question. You do good work. There is no doubt about that. A. Well, sir, that's worth coming here for.

Q. Well, the primary function of your company then in Alabama insofar as the local situation is concerned is actually the taking of the pictures at these various places in Alabama, the Penney Stores, by your photographers. Is that correct? A. That is correct. At the request of the Penney Company.

Q. Now, in regard to the collections. I believe that is done by the Penney employees at the local stores. They collect for the pictures if the people accept them? A. That is exactly right.

Q. Actually, don't you pay the Penney Company twelve and one half per cent commission for its services at each of these stores from the gross proceeds, that is, from all of the pictures so sold there? A. Would you restate that?

Q. Well, I am asking you if you do—in other words, as I understand it, the J. C. Penney Company collects all of the funds. A. That's correct.

Q. For all of the pictures there that are sold under this arrangement and Penney has the funds and out of those funds I believe that the advertising is paid for. Is that correct? A. That's correct. It is paid out of the funds.

Mr. Thornton: Well, now, Mr. Burton, I don't want to interrupt you but those exhibits we have there will show that precisely.

By Mr. William H. Burton (Continuing).

Q. But the Penney Company does get twelve and one half per cent gross out of those funds for the services that it renders, does it not? [16] A. Twelve and one half per cent commission of the gross. Shall we say as payment for their services or their normal—whatever they want to call it—profit. They don't—well, I wouldn't elaborate on it.

Q. Well, let me ask you this now. Your organization, that is, Dunbar-Stanley and J. C. Penney in regard to this arrangement, they are two independent corporations or companies, are they not? A. Yes, that is correct.

Q. There is actually no agency existing between the two. They act as two independent contractors you might say. Is that correct? A. That is correct, and no actual contract exists between myself and the Penney Company. It has been a verbal thing since 1953 as long as we perform our duties with no violation of the correct code of ethics, as the Penney Company sees it, we retain our relationship. Of course, it would be natural, if we didn't, that we wouldn't. So, there is not even an existing contract. It is just a tacit agreement.

Q. All right. Now, as to the customers, that is, the people that come in and ultimately buy the pictures after they are taken under this arrangement, I will ask you if Dunbar-Stanley doesn't actually get those lists of customers up? I mean, they actually initiate getting those lists of customers up in each instance. In other words, when your photographer is going to come to one of the Penney localities then he is going to come there and take these pictures. That is correct, is it not? A. That's correct.

Q. In other words, these people are customers whose pictures are going to be taken. They have to be notified or informed that the photographer is going to be at a certain Penney Store on a certain date. Isn't that correct? A. That's correct.

Q. And that the pictures will be taken on that date? A. Correct.

Q. Or the sittings or whatever you may call it? A. Yes.

Q. Now, isn't it a fact that Dunbar-Stanley actually sends these local Penney Stores the cards more or less setting up these appointments and the card there is to be mailed by Penney to the company. In other words, the card is originated by Dunbar-Stanley and sent to Penney's and then Penney's [17] mails the card out to the customer. Is that the correct procedure? A. Substantially. These cards—the Penney Company furnishes us a list of the names of the people that we take photographs of when we are in town. Now, to this list of people—to the previous customers—we address a card and send it back to the Penney Company and they send it to the customers stating that the same photographers are going to be back and this only goes to our previous customers. It is a customer notification card that we are going to be back to perform the same services that we did before. We don't get up a list. It is from the list that the Penney Company sends us on the previous promotions.

Q. Well, don't you have a list there though probably from previous promotions? A. Oh, yes.

Q. And you prepare these cards yourself there in Charlotte, North Carolina? A. Yes, that's correct.

Q. You send them to Penney and Penney actually does the mailing. A. That is correct and they pay the postage.

Q. Well, now, that postage though is deducted out of the amount paid in by the customer, is it not? A. No, sir. That's not right. The postage is completely the Penney Company's. By our agreement on these things, the postage money is an expense of the J. C. Penney Company. The ad itself is our expense.

Q. In other words, you pay for the ad—— A. That's right. That's the reason we send the cards to the town to be mailed from the town. Otherwise, if we paid the

postage, we would pay it from Charlotte and if you will notice by looking at those cards the postmarks are from Mobile, for instance. Those were mailed in Mobile.

Q. Well, I don't think that there is any doubt but that Penney mails the cards out. A. Yes, sir. That's right.

Q. But you prepare the cards, don't you? A. We prepare the cards. Yes, sir.

Q. From your list of customers that you have in Charlotte. A. Exactly.

[18] Mr. Burton: If the Court please, I would like to offer this card into evidence as State Exhibit No. 1.

The Court: All right. Let it be marked.

(Whereupon, One Pixy Pin-Up Advertising Card, dated January 10-14, marked State Exhibit No. 1 for identification, was received in evidence and a photostatic reproduction of same is set out hereinafter.)

Cross-Examination (Continued),
By Mr. William H. Burton.

Q. Now, here is a copy of a Pixy Pin-Up Ad that appear in the Mobile paper. This is from the Mobile Springdale Store. Is that typical of your ads? A. That is the only ad we use as a rule. This ad has been used for a number of years and it is the primary ad.

Q. Well, now, that is paid for by Dunbar-Stanley. I mean, that ad is deducted from the funds which are derived from the pictures? A. That is correct.

Mr. Burton: I offer this in evidence as State Exhibit No. 2, Your Honor.

Mr. Thornton: No objections.

The Court: Received.

(Whereupon, One Penney's Pixy Pin-Up Newspaper Ad, Mobile, Alabama, marked State Exhibit No. 2 for identification, was received in evidence and a photostatic reproduction of same is set out hereinafter.)

Cross-Examination (Continued),
By Mr. William H. Burton.

Q. Now, all these forms, Mr. Hoke, they are prepared—even these forms here—as I understand it, the settlement forms and the cards and all of that are actually prepared by Dunbar-Stanley but are sent to Penney's [19] and Penney might fill the forms out but originally these forms are prepared by Dunbar-Stanley. Is that correct? A. That is correct.

Q. And this same procedure has been followed at all of these nineteen Penney Stores to which you send your photographers. Is that correct? A. The same procedure, yes. Identical.

Q. All right, sir. That's all.

Redirect Examination, by Mr. J. Edward Thornton.

Q. Mr. Hoke, with reference to the arrangement between Dunbar-Stanley and J. C. Penney, you repeated on one or two occasions—you said there was no contract but that there was only an agreement. Now, sir, let's clarify that a little bit. There was a contract between you but it wasn't in writing. Is that what you were really attempting to say? A. The only thing that we could term a contract occurred in 1953 in which the Penney Company by letter said that you are now permitted to work all of our stores and we want you to take our stores over and the following rules and regulations we hope you will observe. We wrote them a letter confirming this and it never was in a legally notarized contract. It was just an agreement.

Q. Well, there is this existing agreement and the parties have abided by it according to the terms of it throughout the years. A. That is right. That includes the percentage agreement and who mails the cards and who pays for the cards and the newspaper advertising and so forth, and, naturally, that exists in the form of an agreement but

an actual, signed, notarized contract that we can work the Penney Company Stores to the exclusion of anyone else, that sort of thing doesn't exist, really.

Q. Now, Mr. Hoke, this business that you are in is highly competitive and there are quite a few others that are in and have been in this type photographic business, aren't there? A. Many of us, yes.

Q. Now, some of these people who do photographic work, they come into the State and they take pictures and then leave and leave no representatives there. Have there been complaints of that kind of activity where the photographers [20] do not have a local office where the customer can, in effect, see to it that their agreements are lived up to? A. I don't believe I follow you, exactly.

Q. Well, let me state it this way. There have been complaints by Better Business Bureaus and by other groups with reference to non-resident, transient photographers. Isn't that right? A. Oh, yes. Many.

Q. And the basis of that objection has been that they do not have a local representative where the customer can go to see about his pictures. Is that the basis of that?

Mr. Burton: Your Honor, I am going to object to that as hearsay and it is immaterial and irrelevant.

The Court: Well, let me note your objection and say that the Court is not going to consider anything but legal, relevant and material testimony.

The Witness: Yes. There are many complaints existing in this field and frankly I feel it is one of the reasons we are pre-eminent in this field because there are never any complaints about us. We do the business through the Penney Company's headquarters and, of course, the customer is well protected. Now, the transient photographer is one who operates out of a hotel and doesn't send the finished picture back and he sends a proof or something and then when the mother gets the proof——

Mr. Burton: I am going to object to his defining a transient photographer.

Mr. Thornton: Well, I believe you were interrupted. Finish your sentence and then we will note Mr. Burton's objection.

The Witness: Well, I was stating that the photographer who occasions all of the trouble is the transient photographer who comes to town and does not deliver the goods or who causes excessive selling and who sends his own sales agents in as opposed to us. We don't send agents in to sell anything. The Penney Company merely handles the delivery of our photographs.

Q. All right, sir. I have no further questions.

Recross-Examination, by Mr. William H. Burton.

Q. In other words, you are primarily involved locally in that your [21] photographers have taken the pictures? A. That is correct.

Q. All right. I have no further questions. A. I might add this though. The price on our photographs, of course, seems to be ridiculously low. It is and there is no doubt about that. I am not giving a sales talk here but the reason that it can be so low is primarily due to the fact that we do not have to send another crew into town to put up in a motel or places like that and pay room rent and squeeze the people and then send the pictures back for further finishing to be mailed back. All of this complicated process only runs the price of the pictures up. Our fundamental operation with the Penney Company is as a service operation making the photographs that are developed in the State of North Carolina and shipped back through the mail to be delivered by the Penney Company representative and not ours.

Q. Well, that is mainly a matter of economy, there and good business, you might say. A. That is right.

Q. All right, sir. That's all.

Mr. Thornton: We rest, if the Court please.

Mr. Burton: Your Honor, we have a plea to the effect that this question has already been adjudicated by our Supreme Court——

Mr. Thornton: Well, do you have any further testimony?

Mr. Burton: No. We have no testimony but we say that this has already been decided and we have a plea in answer to the Bill of Complaint and in support of that I would like to put in evidence a decision of our Supreme Court. The first one is Leon Graves versus the State and it is found in 58 Ala. 359 and in 62 So. 2d 446. This is a copy taken directly from the decision as found in 62 So. 2d of Graves versus the State. I would like to put this in evidence in lieu of the Reporter itself.

Mr. Thornton: Well, the only reason I object to it is that we think it is completely needless. I am sure this Court will take judicial knowledge of the decisions of the Supreme Court of Alabama and it doesn't need to be introduced into evidence.

The Court: I don't believe you need to put it in evidence but you may submit it for the Court's benefit in a brief.

[22] Mr. Burton: Well, actually, I do want to say that I am offering it in evidence——

Mr. Thorton: Well, if you want to leave it with the Court, I will be delighted——

Mr. Burton: Well, I had one other case before where I made the same plea and one of the main objections was that I didn't put the decisions in evidence and I thought it was ridiculous but the Court seemed to be very much puzzled over it.

Mr. Thornton: The Supreme Court?

Mr. Burton: Yes, sir.

The Court: Well, give me the benefit of those Xerox copies.

Mr. Burton: This is Haden versus Olan Mills. That's another one. Here is another one, Olan Mills versus Opelika. That's in Federal Court. The reason for that

decision is that they said, well, the Federal Courts have no business in here because the State Courts have already defined what this license is and its characteristics and we don't have any right to more or less overturn the definition given by the State Courts. We do rely on these three cases.

The Court: Well, you offer them by way of argument?

Mr. Burton: That's right, and in support of our plea of Stare Decisis. This is not Res Judicata but we do say that it is Stare Decisis.

The Court: All right. The State has no further testimony?

Mr. Burton: No, Your Honor. That's all.

The Court: All right, I will take this case under advisement.

(Whereupon, Graves v. State, 62nd Southern Reporter, 2d; Harry H. Haden, Commissioner of Revenue v. Olan Mills, Inc., 135 Southern Reporter, 2d; and Olan Mills, Inc. of Tennessee, Plaintiff, v. Opelika, Greenville, Alexander City, Jasper and Thomasville, Alabama, Defendants, 207 Federal Supplement; were marked as State Exhibit No. 3 for identification and were received in evidence and same is set out in words and figures hereinafter.)

(Exhibits omitted by agreement.)

[23] **DECREE.**

This cause coming on to be heard upon the pleadings and proof, all as noted by the Register, and the Court being of opinion that the Court has jurisdiction proceeds to a finding of fact and a decree.

The Court recognizes a distinguishment in the facts of this case with the **Graves v. State**, 258 Ala. 539, 62 So. 2d 446 (1963), and the **Haden v. Olan Mills**, 273 Ala. 129, 135 So. 2d 388 (1961) cases. The distinguishment, however, is not such that this case is outside the operation of those decisions.

As was said in the Family Discount v. State, 274 Ala. 322, 148 So. 2d 218 (1963), the Graves and Haden cases (supra) involved facts which constituted local activity in Alabama which could be separated from the interstate process or flow of commerce. The tax was not allowed in the Family Discount Case (supra) as a question of fact, not a question of law.

This court is aware of the contrary result obtained in the jurisdictions of Missouri, Kentucky, Virginia, Florida and South Carolina.

The Supreme Court of Alabama, notwithstanding the above in the Haden Case (supra), remarked (Page 389, 155 So. 2d) that once before this Court, when presided over by this Court's predecessor, refused to follow the Graves Case. One such well meant admonishment is sufficient.

In both the Haden and Graves Cases, the Court above levied the tax upon the "conduct of its photographers".

The tax here imposed is upon the "conduct of its (Dunbar-Stanley Studios, Inc.) Photographers."

It is, therefore, Ordered, Adjudged and Decreed by the Court as follows:

1. That the Appellant is liable for the tax imposed.

2. That the imposition of the tax in the instant case is not violative of any provisions of the Federal Constitution as viewed by the Supreme Court of Alabama.

3. That costs are hereby taxed against the Appellant, for which execution may issue.

Done this, the 14 day of March, 1967.

Richard P. Emmet,
Circuit Judge.

Filed in Office 14th day of March, 1967.

OPINION.

The State of Alabama—Judicial Department.
The Supreme Court of Alabama.

October Term, 1967-68.

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3 Div. 278.

Dunbar-Stanley Studios, Inc.,

v.

State of Alabama.

Appeal from Montgomery Circuit Court, in Equity
Per Curiam.

This is an appeal from a final decree of the circuit court of Montgomery County, in equity, that upheld a final assessment of license taxes made by the State Department of Revenue against the appellant imposed by the last line of Section 569, Title 51, Code of Alabama, 1940, reading:

> **"* * * For each transient or traveling photographer, five dollars per week."**

No procedural requisites are here questioned or involved.

Appellant, as we view the pleading and testimony, was a non-resident corporation with its principal place of business in Charlotte, North Carolina, and was so located during the period for which the assessment was made. It sent a photographer, in its employment, to Alabama, to perform the skilled service of taking children's photographs. The exposed film was sent to the North Carolina

studio to be developed and converted into finished photographs, which were sent back to Alabama for delivery to appellant's customers. No photographer engaged in the service was a resident of Alabama.

It seems that the services relative to certain features of the operation were performed through a contractual arrangement with the parent office of J. C. Penney Company which operates stores in several counties in Alabama. The photographer, under the direction of appellant, visited several of the Penney stores in Alabama during the taxable period here under consideration and performed the photographic service, that is, exposing the films for the purpose of making pictures of the subject children.

It further appears that the Penney stores caused certain advertising to be done which resulted in the recruitment of customers for the proposed photographic service. Penney also took the orders which were transmitted to appellant in Charlotte for acceptance. When the orders were accepted, the finished product was sent to the Penney store for delivery to the customer and collection of charges therefor. Penney received a percentage of the money so collected and accounted to appellant for the balance. Penney also made accounting reports to appellant and to its home office.

We might add that appellant prepared cards notifying its customers of the proposed visit of its photographer. These cards were all stamped and mailed by Penney. Penney also did a certain amount of newspaper advertising relative to the photographic service.

When the photographer arrived at the Penney store, he took the pictures, returned the exposed film to the principal office in North Carolina, where the film was developed, and the picture finished and returned to the Penney store for the delivery to the customer and collection of charges, as above noted. Appellant maintained no

office, developing laboratory, or permanent agent in Alabama. The service of exposing the film on the subject child was performed in Alabama through the photographer, with equipment temporarily located in Alabama. With the exception of the laboratory work, preparing announcement cards, exposing the films, all the work incident to the photographic service was performed by Penney employees. We do not find anywhere in the record that the photographer took orders for the pictures. This was done, as we have stated, by Penney employees and mailed to appellant for acceptance.

The contention of appellant is that it was operating through the channels of interstate commerce, and was exempt under Article 1, Section 8, Constitution of the United States, which empowers Congress to regulate commerce among the several states. Appellant insists that the taking of the pictures, or exposing the films, was just a link in a chain of events that constituted an interstate transaction, and that it took all the activities enumerated above to constitute engaging in business as a photographer; hence, the license had to apply to all of it, or there would be no activity to which the license would apply. It insists that this activity, consisting of soliciting orders for out of state activity ending in delivery into the State, is a continuous stream or flow of events which meets the definition of interstate commerce.

Appellee insists that no exemption obtained, and that appellant in exposing the films and taking the pictures of the children was engaged in a taxable event under Section 569, supra, and was subject to the flat tax imposed by said section.

Appellant and appellee have both submitted elaborate and comprehensive briefs in support of their respective contentions. We have carefully reviewed the arguments and the cases cited in an effort to resolve the law ap-

plicable to the pleadings and evidence. Such a resolution is not altogether free from difficulties.

While there were interstate orders submitted to appellant for the finished product, namely, the pictures, and certain preliminary advertising by Penney in recruiting business and customers, we cannot escape the impact and pertinency of two of our Alabama decisions rendered by this court on similar photographic transactions, although in some factual areas not on all fours with the instant transactions. We do not think these factual differences effect the basic pronouncements of this court in **Graves v. State**, 258 Ala. 359, 62 So. 2d 446 (1953), and in **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388 (1961). We observed in the **Graves** case, supra, as follows:

> "• • • It is not necessary to perform all the essentials of the art in Alabama to constitute one a photographer subject to license as such in Alabama. The performance of an important feature of it in Alabama is justification for exercising the licensing power. • • • The distinction between such a situation and that of drummers soliciting and procuring sales to be consummated by interstate shipments has been narrowly drawn in express terms, as we have shown. The principle of the drummers' license cases has not been extended by the United States Supreme Court to a situation where there was locally performed an essential physical act in the performance of a transaction, and where the license was directed solely at that local activity, and where it is not laid on interstate transportation nor is an undue burden upon it."

Paraphrasing **Lucas v. City of Charlotte**, 4 Cir., 86 F. 2d 394, 109 A. L. R. 297, the actual work of the photographer in the instant case and the mechanical finishing of the negatives in Charlotte, North Carolina, does not change the fact that the photographer is carrying on his business at the Penney stores in the State of Alabama.

Our observation in the **Haden v. Olan Mills, Inc.** case, supra, that the conduct of the photographer in the State is a separate and distinct incident upon which the license tax falls has merit and applies to the facts here.

We observed in **Family Discount Stamp Co. of Georgia v. State**, 274 Ala. 322, 325, 148 So. 2d 218, that in the **Graves** and **Haden** cases, supra, "there was local activity in Alabama which could be separated from the interstate process or flow of commerce. We do not think that condition exists in this case."

We are constrained to adhere to our pronouncements in the **Graves v. State**, supra, and **Haden v. Olan Mills, Inc.**, supra, cases until the Supreme Court of the United States has expressed itself on the factual situation before us.

We hold that the license tax required of transient or traveling photographers by Section 569, supra, should be collected from appellant, because of its so-called traveling operation in this State, until the Supreme Court of the United States holds to the contrary. The license tax is upon a local activity and does not infringe on or constitute a burden on interstate commerce.

The decree of the trial court is affirmed.

The foregoing opinion was prepared by B. W. Simmons, Supernumerary Circuit Judge, and was adopted by the court as its opinion.

Livingston, C. J., and Lawson, Coleman and Harwood, JJ., concur.

JUDGMENT.

May 13, 1968.

The State of Alabama—Judicial Department.

The Supreme Court of Alabama.

October Term 1967-68.

3rd Div. 278.

Dunbar-Stanley Studios, Inc.

v.

State of Alabama.

Appeal from Montgomery Circuit Court,
In Equity.

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

It Is Therefore Ordered, Adjudged and Decreed that the decree of the Circuit Court be in all things affirmed.

It Is Further Ordered, Adjudged and Decreed that the appellant, Dunbar-Stanley Studios, Incorporated, a Corporation, and The Travelers Indemnity Company, sureties for the costs of appeal, pay the costs of appeal in this Court and in the Court below, for which costs let execution issue.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 376

DUNBAR-STANLEY STUDIOS, INC.,
a Corporation,
Appellant,

versus

STATE OF ALABAMA,
Appellee.

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT.

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ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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Cases Cited.

Statutes Cited.

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DUNBAR-STANLEY STUDIOS, INC.,
a Corporation,
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Appellee.

STATEMENT AS TO JURISDICTION.

In compliance with Rules 13 and 15 of the Rules of the Supreme Court of the United States, appellant submits herewith this statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of Alabama entered in this cause.

I.

OPINION BELOW.

The opinion of the Supreme Court of Alabama in this case has not yet been reported officially. Unofficially, it is reported in 210 So. 2d 696. A copy of the opinion, however, is attached hereto as Appendix A.

II.

JURISDICTION.

1. Pursuant to Title 51, Code of Ala., sec. 131 (a) and (p), on May 19, 1966, the State Department of Revenue of Alabama made final an assessment against appellant, herein referred to as taxpayer, for privilege license on "transient or traveling photographer" provided in Title 51, Code of Ala., sec. 569. This assessment was appealed to the Circuit Court for the Fifteenth Judicial Circuit of Alabama (Montgomery County) in equity, in accordance with the provisions of Title 51, Code of Ala., sec. 140. After trial on the merits, wherein taxpayer insisted that the application of the "transient or traveling photographer" license to the activities of taxpayer was a discriminatory burden on interstate commerce, a decree in favor of the State was rendered on March 14, 1967. From this final decree, on March 20, 1967, an appeal was taken to the Supreme Court of Alabama under the general appeal statutes, Tit. 7, Code of Ala., sec. 754, et seq.

2. On the 13th day of May, 1968, the Supreme Court of Alabama affirmed the decree of the Circuit Court, and it is this judgment which is sought to be reviewed on this appeal, and for which a Notice of Appeal was filed with the Clerk of the Supreme Court of Alabama on the 8th day of July, 1968. No application for rehearing was filed in that Court, and its judgment is now final.

3. The statutory provision believed to confer on this Court jurisdiction of this appeal is

28 U. S. C. A., sec. 1257 (2).

4. Among the cases believed to sustain the jurisdiction of this Court in this case:

1.

State Cannot Fractionalize and Tax Link in Unbroken Chain of Interstate Activity.

Nippert v. Richmond, 327 U. S. 416, 423 (1946).

2.

Flat-Sum Privilege License on Interstate Activity Invalid.

West Point Grocery Co. v. Opelika, 354 U. S. 390 (1957).

3.

Increasing Tax Burden Because of Interstate Activity Invalid.

Leloup v. Port of Mobile, 127 U. S. 640 (1888).

See also:

Portland Cement Co. v. Minnesota, 358 U. S. 450 (1959);

Sprout v. South Bend, 277 U. S. 163, 171 (1928).

4.

State Cannot License Interstate Activity.

Crutcher v. Kentucky, 141 U. S. 47 (1891);

Spector Motor Service v. O'Connor, 340 U. S. 602 (1951).

5.

Other Jurisdictions Have Held Such Licenses Void.

Olan Mills, Inc. v. City of Tallahassee, ... Fla. ..., 100 So. 2d 164 (1958), cert. den. 359 U. S. 924.

Also see cases collected in **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388 (1961).

5. The statute applied to taxpayer's activities, and therefore whose validity is involved, is:

Title 51, Code of Ala., sec. 569:

"§ 569. **Photographers and photograph galleries.** Every photograph gallery, or person engaged in photography, when the business is conducted at a fixed location: In cities and towns of seventy-five thousand inhabitants and over, twenty-five dollars; in cities and towns of less than seventy-five thousand and not less than forty thousand inhabitants, fifteen dollars; in cities and towns of less than forty thousand and not less than seven thousand inhabitants, ten dollars; in cities and towns of less than seven thousand and over one thousand inhabitants, five dollars; in all other places whether incorporated or not, three dollars. The payment of the license required in this section shall authorize the doing of business only in the town, city or county where paid. For each transient or traveling photographer, five dollars per week."

III.

QUESTIONS PRESENTED.

Taxpayer is engaged in the business of soliciting orders for and taking baby pictures throughout the country, out of Charlotte, North Carolina, operating in and using the facilities of a nation-wide chain of moderate priced department stores (J. C. Penney Company). The City of Mobile, Alabama, sought to impose a discriminatory privilege license tax on these activities (as more fully appears in the related case, **Dunbar-Stanley Studios, Inc. v. City of Mobile**, which is appealed with this case) and then the State of Alabama sought to impose the license tax quoted above on these same activities. The questions presented in this case are:

(1) whether or not these activities in interstate commerce are subject to this flat, fixed sum, unapportioned admission privilege license tax as a condition precedent to the performance thereof in the State of Alabama;

(2) whether or not the unbroken chain of interstate activities here involved may be fractionalized into parts on which state licenses may be imposed; and

(3) whether or not the applicability of a weekly rather than an annual license increasing the amount exacted can be made dependent upon interstate activity?

IV.

STATEMENT OF THE CASE.

Taxpayer has operated openly through the J. C. Penney Company stores in eight cities in Alabama since 1963 without hindrance from the State of Alabama, and without being assessed any privilege license by the State Department of Revenue or anyone else under the statute quoted above. In 1963, the City of Mobile demanded of taxpayer and was paid a city license imposed on "itinerant photographers." Since taxpayer was and is not an "itinerant photographer", this was refunded, but under an agreement made with the City that J. C. Penney Company obtain a City "local photographer's" license. J. C. Penney Company took out this license and continued to do so through the year here involved. On August 31, 1965, without prior notice to taxpayer or J. C. Penney, the City levied a license of $50.00 a day on some photographers, which was sought to be imposed on taxpayer and employees of J. C. Penney Company, with criminal sanctions. Taxpayer sought an injunction and Declaratory Judgment in the State Court to test the validity of this City License, all as appears more fully in the related case of

Dunbar-Stanley Studios, Inc. v. City of Mobile, appealed herewith to this Court.

Thereafter, on May 19, 1966, the State Department of Revenue assessed the privilege license quoted above against taxpayer for the operations in Mobile and seven other Cities in Alabama, not only for the current license, but for licenses for prior years as escapes for as many years as the statutes of Alabama would permit. From this assessment, an appeal to the circuit court was taken.

From the pleadings and oral testimony taken in open court it was developed that taxpayer was engaged in the photography business in Charlotte, North Carolina, specializing in photography of children. It had no office, inventory, developing laboratory or agent in Alabama. J. C. Penney Company was a department store which entered into an agreement for taxpayer to engage in taxpayer's photography work in the Penney stores, some of which were in Alabama. The dates of visits by taxpayer's photographers were fixed by the local Penney store managers. Newspaper advertisements were run by Penney, but its cost was deducted from the gross receipts. Taxpayer prepared postal cards notifying its customers of the visits, which were mailed out by Penney.

Taxpayer's photographers then came into Alabama, solicited orders for pictures, took pictures, returned the exposed film to Charlotte, with the customer's orders for pictures, and if the orders were accepted, the pictures were developed, printed and finished. The finished pictures were returned to the Penney stores where they had been taken, and they were paid for and picked up by the customer. The payments were made to the Penney employees only, and not to taxpayer's photographers or agents.

Penney retained 12½% of the receipts as its commission, and after deducting expenses, remitted the balance to taxpayer. Penney did no photography work in Ala-

bama. This was done by taxpayer on Penney's premises, though subject to Penney's store rules as to hours, time, place, etc., of taking the pictures.

This was single-visit photography, as distinguished from three-stage photography engaged in by Olan Mills as shown in **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388 (1961).

Before the State Department of Revenue, taxpayer raised the point that taxpayer was engaged in the solicitation of orders for baby pictures and the subsequent delivery of the pictures at the end of an uninterrupted movement in interstate commerce and the imposition of this flat, fixed sum, unapportioned admission privilege license was in violation of the Commerce Clause of the Federal Constitution. The State Department of Revenue overruled this objection and made final the assessment.

In the Circuit Court, in the pleadings filed by taxpayer, it was specifically alleged in Paragraph 4 of the Bill of Complaint:

> "4. During all time here pertinent, Appellant has been and is now engaged exclusively in interstate commerce, for which it is not now liable to Appellee for the licenses claimed here or for any other license, in this: * * *."

In the Prayer for Relief, it was alleged:

> "Wherefore, Premises Considered, Appellant prays that upon final hearing hereof that this Court hold:
>
> 1. That Appellant is not liable for the license imposed by said assessment,
>
> 2. That Appellant is engaged in interstate commerce,
>
> 3. That imposition of said license to the activities of Appellant violates the provisions of the Federal Constitution, including the commerce clause."

The trial court expressly passed on these issues, providing in its Decree:

> "1. That the Appellant is liable for the tax imposed.
>
> 2. That the imposition of the tax in the instant case is not violative of any provisions of the Federal Constitution as viewed by the Supreme Court of Alabama."

From this Decree, there was an appeal to the Supreme Court of Alabama. The Assignment of Errors in that Court contains as grounds, among others:

> "1. The trial court erred in holding that the imposition of the privilege license imposed by Title 51, Code of Ala., Sec. 569, on Appellant is not a violation of any provision of the Federal Constitution (Tr. 69).
>
> 2. The trial court erred in holding that Appellant is liable for the privilege license imposed by Title 51, Code of Ala., Sec. 569" (Tr. 69).

The Supreme Court of Alabama spoke directly to this contention of taxpayer, saying:

> "The contention of appellant is that it was operating through the channels of interstate commerce, and was exempt under Article 1, Section 8, Constitution of the United States, which empowers Congress to regulate commerce among the several states."

The Supreme Court cited and quoted from two Alabama cases, namely, **Graves v. State**, 258 Ala. 359, 62 So. 2d 446 (1953), and **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388 (1961) and then, in our judgment, invited a review by this Court, by saying:

> "We are constrained to adhere to our pronouncements in the **Graves v. State**, *supra*, and **Haden v.**

Olan Mills, Inc., *supra*, cases until the Supreme Court of the United States has expressed itself on the factual situation before us.

"We hold that the license tax required of transient or traveling photographers by Section 569, supra, should be collected from appellant, because of its so-called traveling operation in this State, until the Supreme Court of the United States holds to the contrary. The license tax is upon a local activity and does not infringe on or constitute a burden on interstate commerce."

V.

THE QUESTIONS ARE SUBSTANTIAL.

At its place of business in Charlotte, North Carolina, taxpayer originated a specialty in taking 5 × 7 baby pictures at .59¢ each. The specialty developed into a nation-wide business in conjunction with the J. C. Penney Company Department stores. Its business is interstate in its nature and scope. It is now doing business in 47 of the 50 states, and even in foreign countries. It is now and always has collected and remitted local sales taxes where applicable. But Alabama is now standing in the door to exact a flat, fixed sum, unapportioned admission privilege license before taxpayer can engage in this interstate activity in Alabama. Furthermore, Alabama is seeking to impose this license on taxpayer for every county in the State where it operates, and for each week taxpayer so operates, though privilege licenses on local photographers are only annual.

The Photographer's license is on those engaged in photography

(1) "at a fixed location", and

(2) as a "transient or traveling photographer."

It is apparent that taxpayer operated at fixed locations throughout the State,—in J. C. Penney stores. The State Department of Revenue took the position that taxpayer was a "transient or traveling photographer" and the courts affirmed this.

The business of photography, as most businesses, has many parts. The privilege license seems to apply only to the whole. But suppose one only developed film in Alabama, but did nothing else in Alabama in connection with photography. Could it be said that he was in the photography business in Alabama? The same question can be asked for the other parts of the photography business. So, in the case at bar, taxpayer only solicits orders and exposes film in Alabama. Is this engaging in the photography business in Alabama? The Supreme Court of Alabama held that it was.

This is explained by the case of **Graves v. State**, 258 Ala. 359, 62 So. 2d 446 (1953), where an employee of Olan Mills, Inc., a non-resident photography concern, was prosecuted criminally for engaging in business within the State as a "transient or traveling photographer" without a license. The facts were that Olan Mills sent in two groups of employees, the first to solicit orders, and the second to expose the film and forward it to out-of-state headquarters for developing and processing. Graves exposed the film only. He had not solicited orders, or done anything else in the process. There were serious questions as to the applicability of this license on the business of photography (1) to one merely exposing films, and (2) to an agent acting within the line and scope of his employment, etc. But the Court held the license did apply in this case. The matter most discussed by the court was the validity of the license as so applied. The Supreme Court distinguished the drummer cases, saying:

> "The license tax here imposed is not laid on the solicitation of orders."

If the Court had not so held, the license would not apply to Graves who did no solicitation. The Court further distinguished cases from other States where Olan Mills was held exempt from State privilege licenses under the Commerce Clause, for

> "they refer to a tax on soliciting or selling goods in interstate commerce."

And this was appropriate in that case for Graves did no soliciting. But it was implied that had the tax been imposed on soliciting orders there might be a different result.

However, in **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388 (1961), the employer brought a declaratory judgment action to ascertain the constitutionality of this license as applied to its operations in Alabama by three different types employees, first those coming to town to solicit orders, second, the one exposing film (As Graves), and third, those bringing back proofs from which customers could select the one to be finished. Contrary to the facts in the **Graves** case, solicitation was involved in this case, plus the sending in the proof-selector. Notwithstanding this, the Supreme Court of Alabama said:

> "The facts here are in all material respects the same as those presented in the case of **Graves v. State** • • • in so far as they relate to the so-called road or traveling operation."

Even more incomprehensible is the additional statement:

> "We refused to apply the rule of the 'drummer cases' [in **Graves**] reaffirmed in **Nippert v. City of Richmond** • • • because Olan Mills, Inc., in carrying on its transient operation in this state did much more than solicit business within this State."

This is a misstatement. Graves did not do more than solicit. He did no soliciting. He exposed film only.

Nippert did involve solicitation. But Graves did not solicit. Hence, presumably, in **Graves** the Alabama court thought **Nippert** inapplicable. But as hereinafter set out, this overlooks the holding in **Nippert** that interstate activity cannot be fractionalized into parts, such as solicitation, and taxed as a local activity.

The Court in **Haden** then held that in **Graves**:

> "the conduct of the photographer in this state is a separate and distinct incident upon which the license tax falls."

This statement is also misleading because Graves only exposed film in the State. If he were subject to the license, it had to be because the license was on exposing film. To say that the license ONLY covered exposing film is a *non sequitur*.

The Court then held in **Haden** that since Olan Mills exposed film in the State, this was subject to the Photographer's License, and it was all that was subject to the tax. Therefore, the mere fact that Olan Mills also solicited orders was irrelevant, for the tax did not reach that.

Finally, the Court held that even though Olan Mills had fixed places where the film was exposed, since the film went out of the State, the applicable license was the one on "transient or traveling photographers", and not for engaging in photography "at a fixed location."

Besides being a peculiar way to construe a statute, these cases present in bold relief the right of a State to fractionalize an interstate activity and impose a privilege license on one essential part of the activity, and thereby evade the cases prohibiting a flat-sum privilege license on an interstate enterprise whose only contact is the solicitation of orders and the subsequent delivery of goods at the end of an uninterrupted movement in interstate commerce. **West Point Grocery Co. v. Opelika**, 354 U. S. 391 (1957).

So, an annual license on a business at a fixed location and a weekly license on transients for the weeks the transient operates is understandable. But to make a business at a fixed location pay a weekly license reserved for transients is not so clear. When the Supreme Court of Alabama says in the **Haden** case that it makes this difference in treatment between businesses operated at a fixed location because one of them

> "sends its films back to Chattanooga to be processed and pictures are ultimately made in Chattanooga"

then we have the imposition of a different type license (weekly) because of interstate activity. Insofar as we know, this has never been countenanced.

These questions are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

1.

The Right of a State to Fractionalize Interstate Activity and License Essential Components Should Be Finally Determined by This Court in This Case.

(1) The decision of the Supreme Court of Alabama on this question is probably wrongly decided.

In **Nippert v. Richmond**, 327 U. S. 416, 423 (1946) this Court said:

> "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the

tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves incidents occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them 'separate and distinct' or 'local', and thus achieve its desired result.

It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax."

See also:

Freeman v. Hewit, 329 U. S. 249, 267, 271 (1947);

Memphis Steam Laundry v. Stone, 342 U. S. 389, 392 (1952);

Railway Express Agency v. Virginia, 347 U. S. 359, 367, 368 (1954).

These cases hold that the States cannot segregate solicitation from the interstate activity and evade the Commerce Clause by licensing the solicitation. The rationale of these cases, and the quoted language, would prohibit Alabama from segregating exposing film in the photography business and thereby evade the Commerce Clause protection of interstate commercial activity. Hence, the holding in the case at bar that Alabama can license exposing film in Alabama (an essential part of the photography business) and that this will evade the limitations of the Commerce Clause on state taxation of inter-

state activity is contrary to the holdings of this Court noted above.

(2) The question should be finally determined.

Alabama is committed to the doctrine that the Legislature may fractionalize interstate activity and license the local portion thereof. In addition to the cases noted above,

> See **Family Discount Stamp Co. v. State**, 274 Ala. 322, 325, 148 So. 2d 218 (1962).

It cannot be denied that there is language in some cases in this Court involving other taxes and other licenses which might be thought to sustain the position of the Alabama courts in this case. Thus in a case involving a franchise tax on a foreign corporation operating a pipeline, the right of the State to tax "local incidents" is set out in

> **Memphis Natural Gas v. Stone**, 335 U. S. 80, 86, 87 (1948).

So with reference to a gross receipts tax on wholesalers.

> **General Motors v. Washington**, 377 U. S. 436, 447 (1964).

A license graduated on a percentage of the business done was involved in

> **Alaska v. Arctic Maid**, 366 U. S. 199, 203, 204 (1961).

In 15 C. J. S. 785, Commerce, Sec. 111 (2), it is positively stated:

> "• • • intra-state events or local activities in connection with interstate commerce will permit the imposition of a state or local license or privilege tax."

None of these involve an admission privilege license, but the right of a state to fractionalize interstate activity and

tax the non-interstate portions of it has been thought to exist. These matters should be answered, and only this Court can do so, and this case should be the place where it is concluded.

2.

The Right of a State to Impose a Flat-Sum Privilege License on an Essential Element of an Interstate Activity Has Probably Been Wrongly Decided by the Supreme Court of Alabama in This Case.

In **McGoldrick v. Berwind-White Coal Mining Co.**, 309 U. S. 33, 45 (1940), this Court said:

> "Fixed-sum license fees regardless of the amount, for the privilege of carrying on the commerce, have been thought likely to be used to overburden the interstate commerce."

This is precisely the effect of the license in the case at bar.

In **West Point Grocery Co. v. Opelika**, 354 U. S. 390, 391 (1957) this Court said:

> "We held in **Nippert v. Richmond**, 327 U. S. 416, and in **Memphis Steam Laundry Cleaner, Inc. v. Stone**, 342 U. S. 389, that a municipality may not impose a flat-sum privilege tax on an interstate enterprise whose only contact with the municipality is the solicitation of orders and the subsequent delivery of goods at the end of an uninterrupted movement in interstate commerce, such a tax having a substantial exclusory effect on interstate commerce."

Hence, had the Supreme Court of Alabama held that this license applied to the solicitation of orders for photographs, this holding would have been clearly contrary to the cases noted.

However, that Court held this license applicable only to the exposure of film. But, the exposure of film, though occurring in Alabama, was as essential to the business of photography as was solicitation of orders for photographs. See **Nippert v. Richmond**, 327 U. S. 416, 423 (1946).

If a flat-sum privilege license on solicitation of an interstate activity is invalid under the Commerce Clause, so such a license on exposing film should be invalid.

3.

The Right of a State to Classify Businesses According to Interstate Activity and Impose a Greater Burden on Those Engaged in Interstate Activity Than on Other Businesses Violates the Commerce Clause.

The annual state photographer's license on those engaged in business "at a fixed location" in the cities where taxpayer operates is:

Andalusia	$10.00
Anniston	10.00
Birmingham	25.00
Decatur	10.00
Dothan	10.00
Jasper	10.00
Prichard	15.00
Mobile	25.00

Because taxpayer sends its film back to North Carolina to be processed (see **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 132, 135 So. 2d 388) this license becomes $5.00 for each week taxpayer operates in these cities, even though the business is engaged in "at a fixed location." Hence, Alabama imposes a higher tax on taxpayer because of its interstate activity than it does on taxpayer's competitors who are not engaged in interstate activity.

The right of a State to classify businesses according to interstate activity, and exclude those engaged in interstate activity may be permissible.

See **Singer Sewing Machine Co. v. Brickell**, 233 U. S. 304, 313 (1914).

The converse, however, is not true. To classify the businesses and then impose a different and higher tax on those engaged in interstate activity is clearly bad. This is the doctrine of **West Point Grocery Co. v. Opelika**, 354 Ala. 390 (1957), and the cases cited there. It is also set out in **Portland Cement Co. v. Minnesota**, 358 U. S. 450, 458 (1959), **Sprout v. South Bend**, 277 U. S. 163, 171 (1928), and the other cases set out in the Jurisdictional Statement in **Dunbar-Stanley Studios v. Mobile**, filed herewith.

In fact, it is on this very point that an earlier case from Mobile was overruled by this Court. In **Osborne v. Mobile**, 16 Wall. 479 (1873), the city imposed a license on express companies doing business in the city only of $50.00, in the State $100.00, outside the State, $500.00. The classification was held not to violate the Commerce Clause. However in **Leloup v. Port of Mobile**, 127 U. S. 640, 648 (1888), the **Osborne** case was overruled on the ground that "no state has the right to lay a tax on interstate commerce in any form * * * on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

Therefore, this Court has held that a case sustaining a classification based on interstate activity is no longer valid. Since the City is again doing the same thing, this case should be reviewed, and this effort should also be thwarted by this Court.

Interstate Commerce Cannot Be Licensed by the States.

The Supreme Court of Alabama has applied the transient photographer's license to taxpayer because of interstate activity, which makes the case one of discriminatory treatment of interstate activity. But this is not necessary to strike down this license. The point is that in this case it is applied directly to interstate activity.

A license applying non-discriminatorily to interstate and intrastate commerce is nevertheless invalid insofar as it is applied to the interstate commerce, and the mere fact that the license applies equally in both cases does not save it. The invalidity of licenses under the Commerce Clause on interstate commerce was established in the case of **Leloup v. Port of Mobile**, 127 U. S. 640, 648 (1888). And this was true "even though the same amount of tax should be laid on domestic commerce," **Robbins v. Taxing District**, 120 U. S. 489, 497 (1887).

This has been followed:

Crutcher v. Kentucky, 141 U. S. 47, 58 (1891);
Barrett v. New York, 232 U. S. 14, 31 (1914);
Spector Motor Service v. O'Connor, 340 U. S. 602, 608, 609 (1951);
Memphis Steam Laundry v. Stone, 342 U. S. 389, 392, 393 (1952).

Since the State has licensed interstate activity in this case, this Court should review it and reverse it.

5.

The Overwhelming Weight of Authorities Hold That Such Privilege Licenses as Are Here Involved Are in Violation of the Commerce Clause.

Almost every state court which has considered the validity of a local licensing or privilege tax on similar activities by photographers has held that such license on a business exclusively interstate in character is invalid as violating the commerce clause of the United States Constitution. The basis for the state court decisions striking down local privilege license taxes as applied to photographers is amply summarized by the court in **Olan Mills, Inc. v. City of Tallahassee**, 100 So. 2d 164 (Fla. 1958), Cert. Denied, 359 U. S. 924, a case involving a license tax of $25.00 per year, the same rate applying to both resident and non-resident photographers, wherein the court stated:

> "Since the **Nippert** case was decided the Supreme Court of the United States has squarely held that any direct tax upon the privilege of carrying on a business exclusively interstate in character is invalid as violating the commerce clause and that this is true no matter how fairly the tax is apportioned to business done within the state. **Spector Motor Service, Inc. v. O'Connor**, 340 U. S. 602, 71 S. Ct. 508, 95 L. ed. 573. The same rule was adhered to in the recent case of **Railway Express Agency, Inc. v. Commonwealth of Virginia**, 347 U. S. 359, 74 S. Ct. 558, 98 L. ed. 757."

See also:

Nicholson v. Forrest City, 216 Ark. 808, 228 S. W. 2d 53 (Ark. 1950). (License tax applied equally to local and out of state photographers—held constitutes an undue burden on interstate commerce);

Graves v. City of Gainesville, 78 Ga. App. 186, 51 S. E. 2d 58 (1958). ($15.00 per year tax on resident photographers and $10.00 per day on all itinerant photographers—held undue burden on interstate commerce);

Commonwealth v. Olan Mills, Inc., 196 Va. 898, 86 S. E. 2d 27 (1955). (Tax applied equally to local and out of state photographers—held the exposing of the film by a photographer an integral part of interstate commerce and tax an undue burden thereon);

Olan Mills, Inc. v. Town of Kingtree, 236 S. C. 535, 115 S. E. 2d 52 (1960);

Bossert v. City of Okmulgee, 97 Okla. Crim. 140, 260 P. 2d 429 (1953).

Additional cases are discussed and summarized in an annotation "Regulation of Practice of Photography" appearing in 7 A. L. R. 2d 416 (1949). See also Later Case Service.

The taxpayers' actual operation as is involved herein was expressly held to be interstate in character in **Dunbar Stanley Studios v. Victor C. Breen, et al.**, a three judge district court decision for the United States District Court for the District of New Mexico filed in Albuquerque on September 22, 1964. This case has not been reported, either officially or unofficially. A copy of the opinion, however, is attached hereto as Appendix C. In this case the three judge federal court held that a New Mexico licensing statute which required Dunbar-Stanley Studios to pay a license tax or charge of $350.00 per year constituted an undue burden on interstate commerce.

Alabama stands virtually alone in upholding privilege licenses as are here involved and in separating for purposes of local taxation the various integral links involved in the business of photography. This conflict between Alabama

courts interpretation of the power of the state and its municipalities to tax the interstate activities of photographers and the interpretation by courts of the other states, and the United States Supreme Court, should be resolved. The Alabama court has invited it in this case. We invite it. We suggest that unless this court does answer in this case, the conflict will continue indefinitely. We urge this court to review this question in this case and resolve these conflicts.

6.

A Copy of the Opinion Delivered Upon the Rendering of the Judgment Sought to Be Reviewed Is Attached Hereto as Exhibit A.

7.

A Copy of the Order of the Supreme Court of Alabama Appealed From Is Attached Hereto as Exhibit B.

Respectfully submitted,

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P. O. Box 23,
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THORNTON and McGOWIN.

Certificate of Service.

I, J. Edward Thornton, an attorney and member of the Bar of this Court, one of the attorneys of record for Dunbar-Stanley Studios, Inc., a corporation, Appellant herein, certify that I served a copy of the foregoing Jurisdictional Statement on Hon. William H. Burton, Attorney for the State of Alabama, Appellee herein, by depositing the same in a United States mail box, with first class postage prepaid, addressed to him as counsel of record at his post office address on the 5th day of August, 1968.

J. Edward Thornton,
Attorney.

APPENDIX.

EXHIBIT A.

The State of Alabama—Judicial Department.

The Supreme Court of Alabama.

October Term, 1967-68.

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3 Div. 278.

Dunbar-Stanley Studios, Inc.,

v.

State of Alabama.

Appeal from Montgomery Circuit Court, in Equity Per Curiam.

This is an appeal from a final decree of the circuit court of Montgomery County, in equity, that upheld a final assessment of license taxes made by the State Department of Revenue against the appellant imposed by the last line of Section 569, Title 51, Code of Alabama, 1940, reading:

"* * * For each transient or traveling photographer, five dollars per week."

No procedural requisites are here questioned or involved.

Appellant, as we view the pleading and testimony, was a non-resident corporation with its principal place of business in Charlotte, North Carolina, and was so located during the period for which the assessment was made. It sent a photographer, in its employment, to Alabama, to perform the skilled service of taking children's photographs. The exposed film was sent to the North Carolina studio to be developed and converted into finished photographs, which were sent back to Alabama for delivery to appellant's customers. No photographer engaged in the service was a resident of Alabama.

It seems that the services relative to certain features of the operation were performed through a contractual arrangement with the parent office of J. C. Penney Company which operates stores in several counties in Alabama. The photographer, under the direction of appellant, visited several of the Penney stores in Alabama during the taxable period here under consideration and performed the photographic service, that is, exposing the films for the purpose of making pictures of the subject children.

It further appears that the Penney stores caused certain advertising to be done which resulted in the recruitment of customers for the proposed photographic service. Penney also took the orders which were transmitted to appellant in Charlotte for acceptance. When the orders were accepted, the finished product was sent to the Penney store for delivery to the customer and collection of charges therefor. Penney received a percentage of the money so collected and accounted to appellant for the balance. Penney also made accounting reports to appellant and to its home office.

We might add that appellant prepared cards notifying its customers of the proposed visit of its photographer. These cards were all stamped and mailed by Penney.

Penney also did a certain amount of newspaper advertising relative to the photographic service.

When the photographer arrived at the Penney store, he took the pictures, returned the exposed film to the principal office in North Carolina, where the film was developed, and the picture finished and returned to the Penney store for the delivery to the customer and collection of charges, as above noted. Appellant maintained no office, developing laboratory, or permanent agent in Alabama. The service of exposing the film on the subject child was performed in Alabama through the photographer, with equipment temporarily located in Alabama. With the exception of the laboratory work, preparing announcement cards, exposing the films, all the work incident to the photographic service was performed by Penney employees. We do not find anywhere in the record that the photographer took orders for the pictures. This was done, as we have stated, by Penney employees and mailed to appellant for acceptance.

The contention of appellant is that it was operating through the channels of interstate commerce, and was exempt under Article 1, Section 8, Constitution of the United States, which empowers Congress to regulate commerce among the several states. Appellant insists that the taking of the pictures, or exposing the films, was just a link in a chain of events that constituted an interstate transaction, and that it took all the activities enumerated above to constitute engaging in business as a photographer; hence, the license had to apply to all of it, or there would be no activity to which the license would apply. It insists that this activity, consisting of soliciting orders for out of state activity ending in delivery into the State, is a continuous stream or flow of events which meets the definition of interstate commerce.

Appellee insists that no exemption obtained, and that appellant in exposing the films and taking the pictures of the children was engaged in a taxable event under Section 569, supra, and was subject to the flat tax imposed by said section.

Appellant and appellee have both submitted elaborate and comprehensive briefs in support of their respective contentions. We have carefully reviewed the arguments and the cases cited in an effort to resolve the law applicable to the pleadings and evidence. Such a resolution is not altogether free from difficulties.

While there were interstate orders submitted to appellant for the finished product, namely, the pictures, and certain preliminary advertising by Penney in recruiting business and customers, we cannot escape the impact and pertinency of two of our Alabama decisions rendered by this court on similar photographic transactions, although in some factual areas not on all fours with the instant transactions. We do not think these factual differences effect the basic pronouncements of this court in **Graves v. State**, 258 Ala. 359, 62 So. 2d 446 (1953), and in **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388 (1961). We observed in the **Graves** case, supra, as follows:

> "• • • It is not necessary to perform all the essentials of the art in Alabama to constitute one a photographer subject to license as such in Alabama. The performance of an important feature of it in Alabama is justification for exercising the licensing power. • • • The distinction between such a situation and that of drummers soliciting and procuring sales to be consummated by interstate shipments has been narrowly drawn in express terms, as we have shown. The principle of the drummers' license cases has not been extended by the United States Supreme Court

to a situation where there was locally performed an essential physical act in the performance of a transaction and where the license was directed solely at that local activity, and where it is not laid on interstate transportation nor is an undue burden upon it."

Paraphrasing **Lucas v. City of Charlotte**, 4 Cir., 86 F. 2d 394, 109 A. L. R. 297, the actual work of the photographer in the instant case and the mechanical finishing of the negatives in Charlotte, North Carolina, does not change the fact that the photographer is carrying on his business at the Penney stores in the State of Alabama.

Our observation in the **Haden v. Olan Mills, Inc.** case, supra, that the conduct of the photographer in the State is a separate and distinct incident upon which the license tax falls has merit and applies to the facts here.

We observed in **Family Discount Stamp Co. of Georgia v. State**, 274 Ala. 322, 325, 148 So. 2d. 218, that in the **Graves** and **Haden** cases, supra, "there was local activity in Alabama which could be separated from the interstate process or flow of commerce. We do not think that condition exists in this case."

We are constrained to adhere to our pronouncements in the **Graves v. State**, supra, and **Haden v. Olan Mills, Inc.**, supra, cases until the Supreme Court of the United States has expressed itself on the factual situation before us.

We hold that the license tax required of transient or traveling photographers by Section 569, supra, should be collected from appellant, because of its so-called traveling operation in this State, until the Supreme Court of the United States holds to the contrary. The license tax is upon a local activity and does not infringe on or constitute a burden on interstate commerce.

The decree of the trial court is affirmed.

The foregoing opinion was prepared by B. W. Simmons, Supernumerary Circuit Judge, and was adopted by the court as its opinion.

Livingston, C. J., and Lawson, Coleman and Harwood, JJ., concur.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 13 day of May, 1966.

J. O. Sentell,
Clerk, Supreme Court of Alabama.

EXHIBIT B.

May 13, 1968.

The State of Alabama—Judicial Department.

The Supreme Court of Alabama.

October Term 1967-68.

3rd Div. 278.

Dunbar-Stanley Studios, Inc.

v.

State of Alabama.

Appeal from Montgomery Circuit Court,
In Equity.

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

It Is Therefore Ordered, Adjudged and Decreed that the decree of the Circuit Court be in all things affirmed.

It Is Further Ordered, Adjudged and Decreed that the appellant, Dunbar-Stanley Studios, Incorporated, a Corporation, and The Travelers Indemnity Company, sureties for the costs of appeal, pay the costs of appeal in this Court and in the Court below, for which costs let execution issue.

EXHIBIT C.

In the United States District Court
for the District of New Mexico.

Dunbar-Stanley Studios, a partnership, Plaintiff,

vs.

Victor C. Breen, District Attorney of Quay County, New Mexico; Claude Moncus, Sheriff of Quay County, New Mexico; Clara Lewalling, County Clerk of Quay County, New Mexico; Alberta Miller, Secretary of the State of New Mexico; Earl E. Hartley, Attorney General of the State of New Mexico, Defendants.

No. 5657 Civil.

John P. Eastham and Duane C. Gilkey, for plaintiff Dunbar-Stanley Studios, a partnership.

Earl E. Hartley, Attorney General of New Mexico, Jay F. Rosenthal, Assistant Attorney General and James V. Noble, Assistant Attorney General, for the defendants.

Before Seth, Circuit Judge, and Payne and Bratton, District Judges.

Bratton, District Judge.

Plaintiff is a partnership composed of Stanley L. Hoke and Needham C. Holden, both citizens of North Carolina.

The business of the partnership is photography and a majority of the operations consists of taking and processing children's photographs. Plaintiff's principal place of business is located at Charlotte, North Carolina.

The defendant Victor C. Breen is District Attorney of the 10th Judicial District of New Mexico, which District includes the County of Quay. The defendant Claude Moncus is Sheriff of Quay County, New Mexico. The defendant Clara Lewalling is County Clerk of Quay County, New Mexico. The defendant Alberta Miller is Secretary of State of the State of New Mexico and by agreement of the parties may now be considered only a nominal party. The defendant Earl E. Hartley is Attorney General of the State of New Mexico.

Plaintiff has for many years had an informal verbal agreement with J. C. Penney Company whereby plaintiff's representatives used the facilities of local J. C. Penney stores for its operations. Typically, for some days before one or more of plaintiff's representatives appeared in a locality, the J. C. Penney store caused advertisements to be inserted in local newspapers advising the public that on certain dates plaintiff's representatives would be at the store and would take and process children's photographs at the price of fifty-nine (59¢) cents per photograph. At the times indicated, mothers appear with the children and photographs are taken by plaintiff's photographer. The exposed films are then sent to plaintiff's plant in North Carolina where they are developed and printed. The finished photographs are then returned to the J. C. Penney store which delivers them to the customer. The J. C. Penney Company store handles all the advertising, takes the orders, receives the money for the photographs and delivers the finished photographs to the customer. The local J. C. Penney store receives a percentage on each sale plus reimbursement of adver-

tising costs for such services. Plaintiff receives the balance of the payments.

Plaintiff has some ninety (90) to one hundred (100) employees so engaged in taking photographs throughout the United States and has operated in, and proposes to operate in, some fourteen (14) localities in fourteen (14) different counties in the State of New Mexico. In order to carry on such an operation it must have available at least ten (10) photographers to meet its scheduling commitments in New Mexico. The photographers go from state to state to meet schedules, and none of its photographers work exclusively in New Mexico. [There is no doubt under the facts of this case that plaintiff is engaged in interstate commerce.]

Sections 60-2-1, 60-2-2, 60-2-3, and 60-2-9, New Mexico Statutes Annotated 1953, commonly referred to as the Itinerant Vendor's Act, provide:

> Section 60-2-1. "'Itinerant vendor' defined.—The term 'itinerant vendor,' for the purpose of this article [60-2-1 to 60-2-22] shall mean and include any person, either principal or agent, who engages in either a temporary or transient business in this state, either in one locality or in traveling about the country, or from place to place, selling manufactured goods, jewelry, wares or merchandise, and it shall include peddlers and hawkers, and also those who for the purpose of carrying on their temporary or transient business, hire, lease or occupy a building, structure, tent, car, vehicle, store room or place of any kind, for the exhibition and sale of any manufactured goods, jewelry, wares or merchandise."
>
> Section 60-2-2. "Exemptions.—The provisions of this article [60-2-1 to 60-2-22] shall not apply to commercial travelers or agents selling to merchants in

the usual course of business, and it shall not apply to the sale of goods, wares, jewelry or merchandise in original packages from other states as permitted by the laws of the United States applicable to interstate commerce between the states: And, Provided, further that the provisions of this Article shall not apply to the sale of books, papers, school supplies or household machinery."

Section 60-2-3. "Operation without license unlawful.—Except as permitted by the preceding section, it shall be unlawful for any person to be engaged in any manner in the business of an 'itinerant vendor' as defined in section 3011 [60-2-1] unless such a person shall be duly licensed so to do, under the provisions of this article [60-2-1 to 60-2-22]."

Section 60-2-9. "County licenses—Fees.—Every 'itinerant vendor' before making a sale of any manufactured goods, jewelry, wares or merchandise in any county in this state, shall procure a county license from the county clerk of that county and pay the following named fees therefor, viz.:

"For each 'itinerant vendor' traveling on foot or with one (1) horse, two hundred and fifty dollars ($250) per annum;

"For each 'itinerant vendor' traveling with two (2) horses, three hundred dollars ($300) per annum;

"For each 'itinerant vendor' traveling on a bicycle, one hundred dollars ($100) per annum;

"For each 'itinerant vendor' traveling in any other manner than hereinbefore described, three hundred and fifty dollars ($350).

"For each 'itinerant vendor' doing business in any building, structure, tent, car, stationary vehicle, store room or certain place of any kind, for the exhibition

or sale of any manufactured goods, jewelry, wares or merchandise, for each such building, structure, tent, car, stationary vehicle, store room or place, two hundred and fifty dollars ($250)."

At the institution of this suit plaintiff's representatives were scheduled to take photographs in the J. C. Penney store in Tucumcari, Quay County, New Mexico, and plaintiff would not pay the above described tax, claiming that it is unconstitutional as applied to its operations.

The defendants Victor C. Breen, Claude Moncus and Earl E. Hartley will prosecute plaintiff's representatives under the provisions of the above quoted statutes should these representatives persist in engaging in the taking of orders for photographs and taking photographs as above described.

The plaintiff contends that the Peddlers and Itinerant Vendor's Act referred to above is invalid and unconstitutional under the Constitution of the United States for the reasons:

(a) The Act is, in effect, a tax on the interstate business carried on by the plaintiff and imposes an undue burden on interstate commerce; and

(b) The licensing costs imposed by the Act make it prohibitive for plaintiff to carry on its operations in New Mexico, and the Act discriminates against the plaintiff, as a non-resident.

It is well settled that a tax is not invalid and unconstitutional merely because it operates on what may be interstate commerce, for interstate commerce must pay its own way and pay its just share of the state tax burden, even though it increases the cost of doing business. **General Motors Corporation v. Washington et al.**, 377 U. S.

436 (at 439), and cases therein cited. The determining factor is whether or not the State tax, in its operation, imposes an undue burden on interstate commerce or by its operation discriminates against those engaged in interstate commerce. An occupation tax non-discriminatory and valid on its face may, in actual operation, become most discriminatory and invalid. The leading case in this respect is **Nippert v. City of Richmond**, 327 U. S. 416 (1946), wherein the Court declared discriminatory and invalid in its operation an ordinance of the City of Richmond laying an annual license tax in the following terms:

> "'[Upon] . . . —Agents—Solicitors—Persons, Firms or Corporations engaged in business as solicitors . . . $50.00 and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. Permit of Director of Public Safety required before license will be issued. . . .'"

This case was followed in **Bossert v. City of Okmulgee**, 260 Pac. 2d 429 (Okla. 1953), and in **Nicholson v. Forrest City**, 228 S. W. 2d 53 (Ark. 1950). In this last named case the Court sums up the decision in **Nippert** very succinctly on page 55 as follows:

> "In the Nippert case, as in the present cases, the ordinance made no distinction between out-of-state solicitors, or solicitors for out-of-state sellers, and local solicitors for domestic sellers. On its face the ordinance and the tax operated equally upon solicitors for interstate sales and solicitors for intrastate sales. It levied a $50 annual tax on each. . . . The Supreme Court pointed out, however, that the tax sustained in the Berwind-White case was a sales tax on sales completed in New York, levied on a percentage basis, therefore burdening each interstate sale thus

completed just as much as a corresponding local sale was burdened, and no more. Not only was the tax non-discriminatory on its face; it was also non-discriminatory in its practical effect as well. Contrariwise, the Richmond tax, superficially the same on all solicitation whether for interstate or intrastate sales, in average practice imposed much the heavier burden on salesmen for extrastate sellers. 'So far as appears a single act of unlicensed solicitation would bring the sanction into play. The tax thus inherently bore no relation to the volume of business done or of returns from it.' If such a tax might be levied by one town, it might be levied by ten towns, or twenty, or all the towns in a state, or all the towns in all the states to which a seller's commerce might extend."

The facts of this case are very similar to the situation in **Nippert, Bossert** and **Nicholson**, and the operation of the New Mexico Statutes which might in effect require plaintiff or its representatives to pay a tax or license charge of Three Hundred Fifty ($350.00) Dollars on each of several representatives in some fourteen (14) different localities of the State of New Mexico. This would be an undue and, in fact, prohibitive burden upon interstate commerce. It is apparent that the New Mexico Statutes in question are, as to the plaintiff, invalid and unconstitutional in their operation.

It is likewise apparent that this action is a controversy arising under the Constitution of the United States and involves sums in excess of $10,000.00 and that the plaintiff has no plain, speedy and efficient remedy in the Courts of the State of New Mexico.

The permanent injunction prayed by the plaintiff should issue and it is so ordered. Settle form of judgment on notice.

The foregoing opinion shall constitute the findings of fact and conclusions of law of the Court.

Dated this 22nd day of September, 1964.

Circuit Judge Seth concurs in the foregoing opinion.

.....
Circuit Judge,
H. Vearle Payne,
District Judge,
Howard C. Bratton,
District Judge.

This copy serves as notice of entry.

Wm. D. Bryars, Clerk,
Sept. 22, 1964.
(Date)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 376

DUNBAR-STANLEY STUDIOS, INC.,
a CORPORATION,
APPELLANT,

versus

STATE OF ALABAMA,
APPELLEE.

ON APPEAL FROM THE
SUPREME COURT OF ALABAMA
3 DIV. 278

MOTION TO DISMISS APPEAL AND MOTION TO AFFIRM

MacDONALD GALLION,
Attorney General for Alabama

WILLARD W. LIVINGSTON,
Counsel, Department of Revenue,
and Assistant Attorney General

WILLIAM H. BURTON,
Assistant Counsel, Department of
Revenue, and Assistant Attorney
General

Counsel for the Appellee

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LIST OF AUTHORITIES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 376

DUNBAR-STANLEY STUDIOS, INC.,
a Corporation

Appellants,

versus

STATE OF ALABAMA,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF ALABAMA
3 DIV. 278

MOTION TO DISMISS APPEAL AND MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of this court, moves that the final judgment and decree of the Supreme Court of Alabama in this cause be affirmed on the ground that the questions which are presented in the "Jurisdictional Statement" of the Appellant are of such an unsubstantial nature that they do not warrant any further review or judicial determination.

Motion is made to dismiss and affirm also on the ground that the alleged questions posed by the Appellant on this appeal relate mainly to the characterization and the process of defining the authoritative meaning of the state taxing statute involved,

which process this court has held on several occasions to be within the exclusive jurisdiction and the prerogative of the state courts. See State of Alabama v. King & Boozer, 314 U.S. 1, at pages 9 and 10, 62 S.Ct. 43, at page 46; United Gas Pipeline Company v. Ideal Cement Company, 369 U.S. 134, at page 135, 82 S.Ct. 676, at page 677; Olan Mills, Inc., of Tennessee v. City of Opelika, et al, 207 F. Supp. 332, at page 335, among others.

I

OPINIONS BELOW.

A copy of the opinion in this case set forth in its entirety will be found on page 25 of the Appellant's Jurisdictional Statement Appendix, Exhibit A, and reference is herein made thereto. It has not as yet been officially reported, but unofficially, and in the Advance Sheet to the Southern Reporter, it is reported as 210 So. (2d) 696.

The opinion of the Supreme Court of Alabama in this case is based and predicated on two former decisions of the Alabama Court which involved facts substantially the same as here, and wherein the issues involved were the same. See Graves v. State, 258 Ala. 539, 62 So. (2d) 446 (1953), and Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So. (2d) 388 (1961), and also see Olan Mills, Inc. of Tennessee v. City of Opelika, et al, 207 F. Supp. 332 (1962).

The observation made by the Supreme Court of Alabama in Haden v. Olan Mills, Inc., supra, 135 So. (2d) at page 390 is typical of the holdings of that court in this case, as well as in the Graves and in the City of Opelika cases, and is as follows:

> "As we have shown above, we feel that the conduct of the photographer in this state is a separate and distinct incidence upon which the tax falls."

II

JURISDICTION

We have no quarrel with the Appellant with reference to the statements made by it under paragraphs numbered 1, 2 and 3 under the topic, "Jurisdiction," as is contained on page 2 of the Appellant's Jurisdictional Statement. However, we strongly disagree with the Appellant with what he states under paragraph 4, pages 2 and 3 of its brief, and under the same topic. We also cannot agree that any of the cases which have been cited by the Appellant on page 3 of its brief and under the same topic are at all applicable to the facts and circumstances of this case. This particularly applies to Nippert v. Richmond, 327 U.S. 416, West Point Grocery Company v. Opelika, 354 U.S. 390, and Olan Mills, Inc. v. City of Tallahassee (Fla.), 100 So. (2d) 164, cert. den. 359 U.S. 924, and the other state cases which are both discussed and distinguished in Haden v. Olan Mills, Inc. 273 Ala. 129, 135 So.(2d) 388, at pages 389 and 390, and which were distinguished and held not to be applicable to the Alabama statute or to the situation in this state in Graves v. State, 258 Ala. 359, 62 So.(2d) 446, at pages 449 and 450.

The cases cited in support of jurisdiction by the Appellant on page 3 of its brief are all cases wherein the statutes involved were said to be directed either at "solicitations" or at sales made in interstate commerce, or where there was a discrimination made against drummers or other salesmen who went from state to state and operated in interstate commerce.

In this case we have no question of "solicitations" or "interstate sales."

". . . this Court is confronted at the outset with the fact that the Supreme Court of the State of Alabama has already, on two separate occasions, construed the tax

ordinances involved and defined the nature of the tax levied thereby. Graves v. State, 258 Ala. 359, 62 So.(2d) 446, and Haden v. Olan Mills, Inc., (Ala. 1961), 135 So.(2d) 388. In each instance, the Alabama Supreme Court construed § 569 of the State statute to be a tax levied upon and directed at the purely local activities of the photographer or other representatives of the company taking and processing the pictures in Alabama."

(Emphasis Supplied)

Olan Mills, Inc. of Tennessee v. City of Opelika, Alabama, et al (U.S. D.C., M.D., Ala., E.D.), 207 F. Supp. 332, at pages 334 and 335.

III

QUESTIONS PRESENTED

The Appellant's topic designated as "Questions Presented," on page 4 of its Jurisdictional Statement, fails to present a clear-cut statement as to what the question on this appeal might be. It is for the most part argumentative and contains impertinent statements which are not revelant to this case or the actual issues involved. Particularly is this applicable to the Appellant's refetence to the case of Dunbar-Stanley Studios, Inc. v. City of Mobile, now No. 377, October Term 1968. That case is entirely a separate and distinct action which has nothing whatsoever to do with this case. That case was decided in the courts below on an entirely different issue than that involved in this case. Moreover, the License Tax Ordinance of the City of Mobile, Alabama, involved in that case is not in any respect the same as the State and County License Tax statute here involved. To attempt to inject the City of Mobile case, No. 377, into this case only serves to confuse and to muddy the waters.

The license tax statute here involved is one of the State and County Business, Occupational and Professional License

Taxes levied under Article 1, Chapter 20, Title 51, Code of Alabama 1940, Recompiled 1958. Such statutes are not in any respect regulatory or police laws. They are merely taxes levied on anyone who engages in any of the businesses, occupations or professions which are designated in such statutes, regardless of whether they come from within or without this state. They are not in any respect permits or entrance fees, but are merely taxes levied on the privilege of engaging in such businesses, and when such businesses are engaged in in this state.

The particular license tax statute, namely, Title 51, Section 569, prior to amendment in 1967, Code of Alabama 1940, Recompiled 1958, is levied on "photographers and photograph galleries." The statute in its entirety is set forth on page 4 of the Appellant's Jurisdictional Statement, so we will not reiterate here. The first part of the statute relates solely to photograph galleries and photographers having a fixed place of business in the county involved, and a separate license tax is levied when Title 51, Section 831, as amended, supra, is read with Section 569, supra, on each such place of business in the county and in the state.

The last part of the statute or the last sentence thereof, levies the separate and distinct license tax on "transient and traveling photographers," which is actually a separate and distinct levy from the first part or tax levied on photographers having fixed places of business in this state. Section 569 of Title 51, supra, then provides insofar as is revelant or pertinent to this case, as follows:

> "For each transient or traveling photographer, five dollars a week."

The license tax then is levied on all transient or traveling photographers in this state, regardless of from where they come, whether they come from within the state or from without

the state, where they go from county to county in this state taking pictures or exposures with their cameras for profit. This license tax has been so administered and applied by the State Department of Revenue over the years. There is no evidence whatsoever in this case that out-of-state traveling photographers who go from county to county in this state taking pictures with their cameras have ever been discriminated against or have been treated any differently for the purpose of this license tax than traveling photographers who reside in this state and who go from county to county in this state taking pictures for profit. The statute applies to all transient photographers equally and alike regardless of from where they come from, whether within the state or without. Moreover, the burden of proof in this respect was on the Appellant in the lower courts, and the Appellant introduced no evidence in this case showing that there was any discrimination in the application and administration of this license tax by those charged in this state with its enforcement.

The Appellee, of course, contends that there is no substantial question involved in this case which would warrant an appeal to this court. However, if the Appellee is wrong in this, then we believe that the question can be best stated as to whether or not under the Commerce Clause of the Federal Constitution the license tax levied in this state on "transient or traveling photographers" under the provisions of Title 51, Section 569, prior to amendment in 1967, Code of Alabama 1940, Recompiled 1958, can be validly levied on such photographers, particularly where the basis of such levy is the assumption that the incidence of the tax, or thing at which the tax is directed, is the activities of such photographers taking place solely in Alabama, namely, those involved in conducting the sittings and taking of the pictures or exposures, when some of the activities involved (said not to be the thing taxed or at which the tax is directed) do take place in interstate commerce.

The question stated in another way might be said to be whether the local activities of the photographers in taking and processing the pictures or exposures in Alabama, can, for the purpose of the incidence of the state license tax on "traveling or transient photographers" under Title 51, Section 569, supra, be validly and realistically separated from the Appellant's other activities, some of which take place in interstate commerce and the license tax directed at such purely local activities, without violating the provisions of the commerce clause.

"The distinction between such a situation and that of drummers soliciting and procuring sales to be consummated by interstate shipments has been narrowly drawn in express terms, as we have shown . . .

"The license here is not laid on the solicitation of the orders."

(Emphasis Supplied)

Graves v. State, 258 Ala. 359, 62 So.(2d) 446, at page 447 (1952).

"The opinion in the Graves case shows that liability for the license was not based on any act of the solicitors used by Olan Mills, Inc., in obtaining the customers, but was based on the conduct of its photographer who moved about in this state from place to place pursuing his profession . . ."

(Emphasis Supplied)

Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388, at page 389 (1961).

"As we have shown above, we feel that the conduct of the photographer in this state is a separate and distinct incidence upon which the license tax falls."

Haden v. Olan Mills, Inc., supra, 135 So.(2d) at page 390.

This court on several occasions has held that the authoritative meaning of a state statute is a matter alone for the state courts to decide.

"Who in a particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority."

Alabama v. King & Boozer, 314 U.S. 1, at pages 9 and 10, 62 S.Ct. 43, at page 46.

"The interpretation of state law by the Court of Appeals, in an opinion by its Alabama member, was rendered in advance of construction of the License Code by the courts of the state, which alone, of course, can define its authoritative meaning."

United Gas Pipe Line Company v. Ideal Cement Company, 369 U.S. 134, at page 135, 82 S.Ct. 676, at page 677.

IV

STATEMENT OF THE CASE

The Appellant's "Statement of the Case," is in several instances argumentative rather than an actual statement of the facts.

Appellant states on the one hand in this respect, and actually at the very beginning of his "Statement of the Case," that Appellant's transient photographers have operated and done business in this state, using J. C. Penney Company stores as their bases or places of operation, in cities located in some 8 different counties[*1] in this state, since 1963 without being

[*1] The state and county license tax under Section 569 is levied and applied in each county in this state in which a transient photographer operates regardless of whether he comes from within or without the state. One county license is sufficient for him to operate throughout the entire county. The number of cities or towns in this state that the transient photographer operates in is entirely immaterial, and has nothing whatsoever to do with either the levy or the measure of the tax. It is for the operation of the transient photographer in the county that the tax is levied, and the tax is so applied.

detected by agents of the state until the assessments were made against it in this case in 1966 (thus, implying that the state had waived its right to now collect the license tax from the Appellant), and on the other hand the Appellant argues that this license tax is an entrance fee and that it cannot enter the state until it has first paid the tax. The facts are that the Appellant's transient photographers have been operating freely and without any restraint insofar as the State of Alabama is concerned since 1963 and Appellant has never paid the tax levied under Section 569, supra, although the state contends in this respect that the Appellant's photographers have operated in some 19 counties in this state.

Again we reiterate that the state and county license tax on "traveling or transient photographers" levied under Section 569 is a part of the license taxes which are levied on businesses, occupations, and professions generally, under Article 1, Chapter 20, Title 51, Code of Alabama 1940, Recompiled 1958, and have repeatedly been held by the courts of this state to be privilege or occupational taxes for the privilege of engaging in such businesses in this state. Jordan Undertaking Company v. State of Alabama, 235 Ala. 516, 180 So. 99; Pure Oil Co. v. State, 244 Ala. 258, 12 So.(2d) 861, 148 A.L.R. 260; and Casmus v. Lee, 236 Ala. 396, 183 So. 185, 118 A.L.R. 182. Such taxes are in no respect police or regulatory laws. The statutes involved do not set up or provide any conditions for a person who comes from without the state to comply with, which are not also required of residents or persons within the state. It is absurd to say that they are entrance fees. The Alabama Court has held to the contrary. Sunflower Lumber Company v. Turner Supply Company, 158 Ala. 191, 48 So. 510 at page 511; United Gas Pipeline Company v. Ideal Cement Company, et al, 277 Ala. 612, 173 So.(2d) 777, at page 778.

It is also well to note in this respect that under Title 51, Sections 450 and 831, as amended, Code of Alabama 1940,

Recompiled 1958, which relate specifically to said business and occupational license taxes, that it was not necessary that the state agents catch the Appellant before this license tax statute becomes operative or the tax becomes due. These statutes made it the duty of the taxpayer itself to timely report and pay the tax. See Griffin, et al v. Edwards, Commissioner of Revenue, 260 Ala. 12, 68 So.(2d) 705, at pages 708 and 709.

The Appellant's reference in its "Statement of the Case" page 5 of its Jurisdictional Statement, to the License Tax Ordinance of the City of Mobile (see Case No. 377, October Term 1968), and the situation concerning the levy of that license tax is highly prejudical and irrelevant and is obviously injected into this case (No. 376, October Term 1968) solely for the purpose of confusing the issues. The City of Mobile Ordinance, and the amount of the levy thereunder has nothing whatsoever to do with this case or the issues involved. The situation in this case and the license tax statute involved is entirely different from the ordinance and situation in the case (No. 377) involving the City of Mobile. The Appellant's reference made on page 5 of its "Jurisdictional Statement" to the two cases being "related," is incorrect.

Upon motion made by the Appellant in the Supreme Court of Alabama, that court refused to even set the two cases down for oral argument on the same day, on the grounds that they were two separate and distinct cases, the one having nothing whatsoever to do with the other.

Rather than to accept the Appellant's version of what the facts might be, we believe that they can best be stated from the record and from the findings of the Alabama Supreme Court (see Appendix, Exhibit A, pages 26 and 27, of Appellant's "Jurisdictional Statement"), as follows:

"Appellant, as we view the pleading and testimony, was (1) a non-resident corporation with its principal place of

business in Charlotte, North Carolina, and was so located during the period for which the assessment was made. It sent a photographer, in its employment, to Alabama, to perform the skilled service of taking children's photographs. The exposed film was sent to the North Carolina studio to be developed and converted into finished photographs, which were sent back to Alabama for delivery to appellant's customers. No photographer engaged in the service was a resident of Alabama.

"It seems that the services relative to certain features of the operation were performed through a contractual arrangement with the parent office of J. C. Penney Company which operates stores in several counties in Alabama. The photographer, under the direction of appellant, visited several of the Penney stores in Alabama during the taxable period here under consideration and performed the photographic service, that is, exposing the films for the purpose of making pictures of the subject children.

"It further appears that the Penney stores caused certain advertising to be done which resulted in the recruitment of customers for the proposed photographic service. Penney also took the orders which were transmitted to appellant in Charlotte for acceptance. When the orders were accepted, the finished product was sent to the Penney store for delivery to the customer and collection of charges therefor. Penney received a percentage of the money so collected and accounted to appellant for the balance. Penney also made accounting reports to appellant and to its home office.

"We might add that appellant prepared cards notifying its customers of the proposed visit of its photographer. These cards were all stamped and mailed by Penney.

Penney also did a certain amount of newspaper advertising relative to the photographic service.

"When the photographer arrived at the Penney store, he took the pictures, returned the exposed film to the

principal office in North Carolina, where the film was developed, and the picture finished and returned to the Penney store for the delivery to the customer and collection of charges, as above noted. Appellant maintained no office, developing laboratory, or permanent agent in Alabama. The service of exposing the film on the subject child was performed in Alabama through the photographer, with equipment temporarily located in Alabama. With the exception of the laboratory work, preparing announcement cards, exposing the films, all the work incident to the photographic service was performed by Penney employees. We do not find anywhere in the record that the photographer took orders for the pictures. This was done, as we have stated, by Penney employees and mailed to appellant for acceptance.

"The contention of appellant is that it was operating through the channels of interstate commerce, and was exempt under Article 1, Section 8, Constitution of the United States, which empowers Congress to regulate Commerce among the several states. Appellant insists that the taking of the pictures, or exposing the films, was just a link in a chain of events that constituted an interstate transaction, and that it took all the activities enumerated above to constitute engaging in business as a photographer; hence, the license had to apply to all of it, or there would be no activity to which the license would apply. It insists that this activity, consisting of soliciting orders for out of state activity ending in delivery into the State, is a continuous stream or flow of events which meets the definition of interstate commerce.

"Appellee insists that no exemption obtained, and that appellant in exposing the films and taking the pictures of the children was engaged in a taxable event under Section 569, supra, and was subject to the flat tax imposed by said section.

(Emphasis supplied)

IV.

THE QUESTIONS ARE NOT SUBSTANTIAL

We do not doubt that the Appellant is now doing business in some 47 states and in some foreign countries, and its principal place of business is in Charlotte, North Carolina, or that its business is interstate in scope. However, Alabama is in no respect attempting to tax any of the activities of the Appellant taking place in any of said other 46 states or in any foreign county or at its place of business in Charlotte, North Carolina. To the contrary, Alabama is only asking that the Appellant pay the license tax under Section 569, as all other transient photographers do whether they come from within or without this state, for the privilege of their following their profession in Alabama, namely, in conducting sittings in this state and in taking the pictures or exposures with their cameras in this state, which activities take place exclusively in Alabama.

> "The license in both respects is directed against one who pursues the art of photography in Alabama. When a photographer comes into the State, or resides in the State, and moves about in it from place to place, pursuing his profession, he is an itinerant. Skiff v. State, 84 Ala. 454, 4 So. 419, supra. He is then in Alabama rendering some of the essentials of the art of photography as a business, the same as if he had a fixed location here. It is not necessary to perform all the essentials of the art in Alabama to constitute one a photographer subject to license as such in Alabama. The performance of an important feature of it in Alabama is justification for exercising the licensing power. Standard Oil Co. v. City of Selma, 216 Ala. 108, 112 So. 532; Sanford Service Co. v. City of Andalusia, supra. The distinction between such a situation and that of drummers soliciting and procuring sales to be consumated by interstate shipments has been narrowly drawn in express terms, as we have shown. The

principle of the drummers' license cases has not been extended by the United States Supreme Court to a situation where there was locally performed an essential physical act in the performance of a transaction and where the license was directed solely at that local activity, and where it is not laid on interstate transportation nor is an undue burden upon it."

(Emphasis Supplied)

State v. Graves, 258 Ala. 539, 62 So.(2d) 446, at 448 and 449 (1953).

See also to the same effect Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388 (1961); and Olan Mills, Inc. of Tennessee v. City of Opelika, et al, 207 F. Supp. 332 (1962).

Standard Dredging Corp. v. State of Alabama, 271 Ala. 22, 122 So.(2d) 280, appeal dismissed 364 U.S. 300, 81 S.Ct. 268.

Dorsey v. Brown, 255 Ala. 238, 51 So.(2d) 360, cert. den. 342 U.S. 818, 72 S.Ct. 34.

Caskey Baking Co. v. Commonwealth of Virginia, 313 U.S. 117, 61 S.Ct. 881 (1941), and cases cited in Footnote 3 as this case appears in 313 U.S. at page 119, and in 61 S.Ct. at page 883.

General Motors Corp. v. Washington, 377 U.S. 436 84 S.Ct. 1564, 1571 (1964).

State of Alaska v. Arctic Maid, 366 U.S. 199, 81 S.Ct. 928 (1961).

Memphis Natural Gas v. Stone, 335 U.S. 80, 86, 87; 68 S.Ct. 1475, 1477, 1478 and cases cited (1948).

General Trading Company v. State Tax Commission, 322 U.S. 335, 64 S.Ct. 1028 (1944).

15 C.J.S. 785, Commerce, Section 111(2), and cases cited in footnotes thereunder.

"The incidence of the tax provides the answer . . ."

Spector Motor Service v. O'Connor, 340 U.S. 602, at 608, 71 S.Ct. 508, at 512 (1951).

Alabama v. King & Boozer, 314 U.S. 1, at 9, 62 S.Ct. 43, at 45 (1941).

United States v. Boyd, 378 U.S. 39, 84 S.Ct. 1518 (1964).

Attention is also called to pages 609 and 610 of the Spector Motor Service opinion as reported in 340 U.S., which clearly recognizes the right of the state to tax local business activities taking place in the state, even though some of the activities connected therewith take place in interstate commerce, where the burden or incidence of the tax is reasonably related to the taxing powers of the state and is nondiscriminatory. Citing International Harvester Company v. Evatt, 329 U.S. 416, 67 S.Ct. 444; Central Greyhound Lines v. Mealey, 334 U.S. 653, 68 S.Ct. 1260; Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546; Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 68 S.Ct. 1475, among other cases.

Appellant again under this topic and on page 9 of its Jurisdictional Statement reiterates its contention that the license involved is an entrance fee or permit to enter and do business in this state. Again we say that this is untrue and incorrect. The licenses levied under Article 1, Chapter 20, Title 51, Code of Alabama 1940, Recompiled 1958, of which Section 569 is a part, show on their face that they are merely business and occupational license taxes, which are levied on the privilege of one engaging in one or more of such businesses in this state, and that they are applied only to those doing business in this state. They are in no respect police or regulatory laws. They are merely privilege taxes for the doing of business in this state, and do not give anyone a license to commit a specific act. Cosmus v. Lee, 236 Ala. 396, 183 So. 185, 118 A.L.R. 822. Also see United Gas Pipeline Company v. Ideal

Cement Company, et al, 277 Ala. 612, 173 So.(2d) 777, 778, and Sun Flower Lumber Company v. Turner Supply Company, 158 Ala. 191, 48 So. 510, 511.

In construing the City of Mobile's License Tax Code applying to businesses, etc., engaged in in that city, which Code had similar provisions to those contained in Article 1, Chapter 20, Title 51, Code of Alabama 1940, Recompiled 1958, and particularly those contained in Sections 450 and 831, as amended, Title 51, supra, the Supreme Court of Alabama in the case of United Gas Pipeline Company v. Ideal Cement Company, et al, supra, 173 So.(2d) at page 779, characterized such taxes, as follows:

> "The Circuit Court decreed, and this court agrees, that the license fee or tax imposed by said ordinance is for engaging in the business of selling and distributing natural gas in the City of Mobile and its police jurisdiction and does not impose a license tax for entering Mobile to engage in business."
>
> (Emphasis Supplied)

Although included in the same Code section, namely, Section 569 of Title 51, supra, the license tax on photographers and photography galleries operating from fixed locations in this state and the license tax on "transient and traveling photographers," are entirely separate and distinct levies.

Despite what the Appellant would have the court believe, the license tax on transient or traveling photographers is levied upon and applied to all transient photographers who travel from county to county in this state and practice their profession, whether such photographers are Alabama residents, who originate their activities in Alabama, or whether they come from without the state. All transient or traveling photographers for the purpose of the levy of the tax or its application are treated alike. Moreover, there is no evidence in this case whatsoever

that any transient photographer who comes from without the state and goes from county to county in this state conducting sittings and taking pictures with his camera has ever been discriminated against, or that there has ever been any preferential treatment in the case of the transient photographers who come from within this state.

The Supreme Court of Alabama has in this case and also in the Graves and Olan Mills, Inc., cases repeatedly pointed this fact out.

"The license in both respects is directed against one who pursues the art of photography in Alabama. When a photographer comes into the state, or resides in the state, and moves about from place to place, pursuing his profession, he is an itinerant."

(Emphasis Supplied)

Citing Shiff v. State, 84 Ala. 454, 4 So. 419.

State v. Graves, 258 Ala. 539, 62 So.(2d) 446, at pages 448 and 449 (1953).

See also Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388, (1961).

In its arguments on pages 10-13, incl., of its Jurisdictional Statement the Appellant misses the boat entirely. The Supreme Court of Alabama in this case and in the Graves and the Haden cases, supra, has characterized this tax and defined the authoritative meaning of the taxing statute,*2 as being a tax directed against the photographer, and the transient photographer as to

*2 This court has held on several occasions that this is the right and prerogative of the state courts. United Gas Pipeline Company v. Ideal Cement Co., 369 U.S. 134, at page 135, 82 S.Ct. 676, at page 677; Alabama v. King & Boozer, 314 U.S. 1, at pages 10 and 11, 62 S.Ct. 43, at page 46; see also Olan Mills, Inc., of Tennessee v. City of Opelika, et al, 207 F. Supp. 832, at pages 834 and 835.

this specific license tax, and the photographer's activities taking place exclusively in this state.

The Appellant repeatedly urges that actually the license tax here involved, although expressly said by the terms of the taxing statute itself to be a license tax on "each transient or traveling photographer," is directed at "solicitations" and sales taking place in interstate commerce.

The Supreme Court of Alabama not only in this case but also in the Graves and Haden cases has clearly and unmistakably construed this taxing statute as being directed at the transient photographer and his activities taking place solely in this state.

> "The license tax here imposed is not laid on the solicitation of orders."
>
> (Emphasis Supplied)
>
> Graves v. State, 258 Ala. 359, 62 So.(2d) 446, at 449.

Contrary to the Appellant's argument, it will be noted that the Alabama Court has construed the statute to the effect that the transient photographer license tax itself is not laid on solicitation of orders, and it can be added that it also is not laid on sales or selling.

For the same result and as to practically the same construction and language see Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388, at page 389.

The Appellant argues that there were no solicitations made by Graves, the photographer, in the Graves case. However, the Graves opinion (62 So.(2d) at page 449) clearly shows, and so states, that Graves, the transient photographer, was an employee of Olan Mills, Inc., of Tennessee and prior to Graves conducting the sittings and taking the pictures, an advanced unit of salesmen (also employees of Olan Mills, Inc.) had solicited and secured contracts for photographs to be made,

and that sometime later and at the appointed time the traveling photographers (a separate and distinct group) would appear and conduct the sittings and take the pictures or exposures. 62 So.(2d) at page 449.

The Appellant tries to draw a distinction between the facts of the Graves case and those involved in the Haden case. There is absolutely no foundation for the Appellant's heretofore unsuccessful attempt to distinguish the facts in the Graves and Haden cases. The activities in the two cases were for all practical purposes the same. Compare the facts as are outlined in Haden (135 So.(2d) at pages 388 and 389) with the facts as are set forth in Graves (62 So.(2d) at page 449).

The reference to the "solicitations" in this case having been made by the Appellant is equally as erroneous. The record shows that the solicitations in this case were actually made by the employees of J. C. Penney, who were employed at the local Penney stores in this state, where the traveling photographer sent out by the Appellant later appeared and conducted the sittings and took the pictures or exposures, as per the appointments made in advance by the local Penney employees.

The record will also show that the President of the Appellant Corporation testified at the trial in the Circuit Court that there was no kind of arrangement whereby the J. C. Penney Company was made, or even considered to be, the agent of the Appellant. That both corporations acted independently in regard to the activities carried on by each. Of course, we realize that whether J. C. Penney Company was the agent of the Appellant in carrying on certain of the activities involved under the facts, would actually constitute a question of law, and one which we do not think it necessary to explore.

The Alabama Supreme Court found (Appellant's Jurisdictional Statement, Appendix, Exhibit A, page 27) that there were no solicitations in Alabama made by the Appellant's employees,

but that the orders for the pictures were actually taken by the local Penney employees.

> "We do not find anywhere in the record that the photographer took orders for the pictures. This was done, as we have stated, by Penney employees and mailed to Appellant for acceptance."
>
> (Emphasis Supplied)

The foregoing being considered and for purposes material and relevant to the alleged questions in this case, the facts in Graves and Haden are very similar, if not almost identical.

APPELLANT'S SHIBBOLETHS LISTED AS 1, 2, 3, 4, and 5, and discussed on pages 13 through 22 of its Jurisdictional Statement are replied to, as follows:

1.

WE AGREE WITH THE APPELLANT THAT ALL CASES INVOLVING ALLEGED VIOLATIONS OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, SHOULD BE DECIDED ON THEIR OWN SPECIFIC FACTS. MOREOVER, THIS APPEARS TO HAVE BEEN THE POLICY OF THIS COURT, JUDGING BY THE DECISIONS OF THE PAST AS WELL AS THE PRESENT.

Our agreement, however, ends in this respect, when the Appellant attempts to draw an analogy between the facts of this case and those involved in Nippert v. Richmond, 327 U.S. 416 (1946), Freeman v. Hewit, 329 U.S. 249 (1947), Memphis Steam Laundry v. Stone, 342, U.S. 389 (1954). The breach even becomes wider when the Appellant attempts to apply the doctrines of those cases to the facts in this case.

The City Ordinance involved in Nippert levied a license tax on "Agents - Solicitors - Persons, Firms or Corporations engaged in business as solicitors." 327 U.S. at page 587. In addition it had this very significant provision: "Permit of

Director of Public Safety required before license will be issued . . ." This last provision did give the specific license ordinance involved in Nippert the earmarks of a license under the police and regulatory powers in addition to being a license tax.

There is a very material difference in the levy of the license in Nippert (expressly on "solicitors" and solicitations) and the state license tax statute involved in Graves, Haden, and in this case, the characteristics of which we have already pointed out in some detail. Also, in this respect it is very important to note that neither the State License Tax Statute involved, Title 51, Section 569, Code of Alabama 1940, Recompiled 1958, nor the general provisions relating to the Business and Occupational License Taxes on the State and County level, namely, Section 450 and Section 831, as amended, et seq., Code of Alabama 1940, Recompiled 1958, require in any place or respect that a permit be procured before any of said business, etc. licenses be issued. As stated before, they have been very clearly held to only be license taxes levied on the doing of any of such business, and the privilege of engaging in such business in this state, and not in any respect entrance fees or licenses giving the licensee permission to do a certain thing.

The Appellant could go into quite an amount of detail in distinguishing the facts, as well as the taxing statutes involved in Nippert, Freeman v. Hewit, Memphis Steam Laundry v. Stone, and Railway Express Agency v. Virginia, and other like cases, from the particular facts and the specific statute involved in the case at bar. However, space and the rules will not permit, nor do we deem this to be necessary as this court is very familiar and conversant with all of these cases.

We will point out that the tax in Freeman v. Hewit was a gross receipts tax on sales. (329 U.S. at 250 and 251). The

tax in Memphis Steam Laundry Cleaners v. Stone (342 U.S. at 425), was a license tax on "each person soliciting business for a laundry not licensed in this state (Mississippi) . . . ." The tax in Railway Express Agency v. Commonwealth of Virginia, was also held under the particular facts of that case (347 U.S. at pages 359 and 360) to be a tax laid directly on interstate commerce and invalid as such. Virginia was said to have a constitutional provision forbidding a foreign corporation from exercising any public service powers or functions in that state. The tax involved was said to be a license tax on the gross receipts earned in the state "on business passing through, into or out of this state (Virginia)." Because of such constitutional prohibition, all purely local or interstate business was done by a separate corporation (a domestic corporation and local subsidiary). Thus, it was said that Railway Express was engaged (like Spector Motor Service, 340 U.S. 602), insofar as Virginia was concerned, strictly in interstate commerce, and the license tax involved as so directed in conflict with the commerce clause.

The crux of the decisions in Nippert, Hewit and Memphis Steam Laundry Cleaners, was that the taxing statutes involved imposed taxes whose incidences were laid directly on "solicitations" or sales in interstate commerce, and thus were laid directly on interstate commerce. The license tax involved in Railway Express Agency was held to be invalid as being laid directly on the gross receipts which Railway Express derived from its purely interstate business. These cases differ very materially from the cases where taxes have been upheld by this court as being directed at or laid on events taking place within the taxing state or local activities, which can be reasonably separated from the interstate activities.

Caskey Baking Company v. Commonwealth of Virginia, 313 U.S. 117, 119, 61 S.Ct. 881, 882, and cases cited under Footnote No. 3.

Memphis Natural Gas v. Stone, 335 U.S. 80, 68 S.Ct. 1475, 1477, 1478 and cases cited.

Spector Motor Services v. O'Connor, 340 U.S. 602, at page 608, 71 S.Ct. 508, at page 512.

Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546.

General Trading Company v. State Tax Commission, 322 U.S. 335, 64 S.Ct. 1028.

State of Alaska v. Artic Maid, 366 U.S. 199, 81 S.Ct. 928.

General Motors Corporation v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 1571; among a number of other cases to the same effect.

The fact that Section 569 of Title 51 of the Alabama Code of 1940, Recompiled 1958, levies only a license tax on the doing of business in this state, or that the License Tax Code of the State of Alabama, of which Section 569 is a part, applies only to such taxes, and in no respect requires fees for the entry of licensees into this state, or a permit before engaging in such businesses, is so apparent from the statutes themselves that we do not believe that any further comment is necessary. We have, however, discussed this particular point in detail already in this brief, as well as having already cited authorities holding that these license taxes are not entrance fees or permits, but are merely taxes on the doing of business in this state, so we will not repeat them here. See Sun Flower Lumber Company v. Turner Supply Company, 158 Ala. 191, 48 So. 510, at page 511, etc.

2.

THE QUESTION POSED BY THE APPELLANT HAS ALREADY BEEN DETERMINED BY THIS COURT.

Cankey Baking Company v. Commonwealth of Virginia, 313 U.S. 117, 119, 61 S.Ct. 881, 882, under Footnote No. 3.

Memphis Natural Gas v. Stone, 335 U.S. 80, 68 S.Ct. 1475, 1477, 1478 and cases cited.

Spector Motor Services v. O'Connor, 340 U.S. 602, at page 608, 71 S.Ct. 508, at page 512.

Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546.

General Trading Company v. State Tax Commission, 322 U.S. 335, 64 S.Ct. 1028.

State of Alaska v. Artic Maid, 366 U.S. 199, 81 S.Ct. 928.

General Motors Corporation v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 1571; among a number of other cases to the same effect.

3.

THE LICENSE TAX ON TRANSIENT PHOTOGRAPHERS APPLIES TO ALL SUCH PHOTOGRAPHERS, WHETHER THEY COME FROM WITHIN OR WITHOUT THE STATE OF ALABAMA, AND NO PREFERENTIAL TREATMENT IS SHOWN UNDER THIS LICENSE TAX STATUTE TO THOSE WHO COME FROM WITHIN THE STATE. IT IS APPLIED EQUALLY TO ALL TRANSIENT PHOTOGRAPHERS.

The annual state license tax on photographers following their profession at a fixed location or place of business in this state has nothing whatsoever to do with the license levied by the Legislature on transient or traveling photographers.

The levy on transient or traveling photographers is complete within itself:

"For each transient or traveling photographer, five dollars per week."

The above quoted levy and license tax is entirely separate and distinct from the levy on photographers doing business at a fixed location in this state, as a reading of Title 51, Section 569, Code of Alabama 1940, Recompiled 1958, will clearly show.

The license taxes imposed by Section 569 of one amount on photographers who have a fixed location in this state and a different amount on transient or traveling photographers have been held by the Supreme Court of Alabama to be two separate and distinct levies and the difference in the amount of the two levies not to constitute an inherent discrimination, but to the contrary to be based upon a reasonable classification of photographers. Graves v. State, 258 Ala. 359, 62 So.(2d) 446, at page 448. See also Finley v. State, 37 Ala. App. 555, 72 So.(2d) 135.

This court on numerous occasions has also recognized the rights of the states to set up proper classifications, and even sub-classifications, for the purpose of levying state taxes, and for the purpose of fixing different amounts for such purpose. This court has also upheld such classifications or sub-classifications wherein there is any reasonable grounds or basis to make such differences or separate classifications. See Carmichael v. Southern Coke and Coal Company, 301 U.S. 495, 57 S.Ct. 868, Clark v. Paul E. Gray, Inc., 306 U.S. 583, 594, 59 S.Ct. 744, 750, 751, Caskey Baking Company v. Commonwealth of Virginia, 313 U.S. 117, pages 120 and 121, 61 S.Ct. 881, at page 883.

The Alabama Supreme Court also in the Graves case (62 So.(2d) at pages 448 and 449, and in the Haden case, and in this case, has recognized, and in effect has held, that the license tax on transient or traveling photographers is levied on transient photographers, whether they come from within or without the state.

The state has also always applied this license tax to all photographers who travel from county to county in this state taking pictures, regardless of whether they are Alabama residents, and their activities originate in this state, or whether they come from without the state. There is absolutely no evidence in this case that there has been any discrimination.

4.

WE ARE THE FIRST TO AGREE THAT INTERSTATE COMMERCE CANNOT BE LICENSED BY THE STATES. HOWEVER, THE TAX IN THIS CASE IS NOT DIRECTED AT INTERSTATE COMMERCE, BUT HAS BEEN CLEARLY HELD TO BE DIRECTED AT LOCAL ACTIVITIES TAKING PLACE WITHIN THIS STATE.

The license tax here under facts very similar to the facts involved in this case has been repeatedly held not to be directed at solicitors or sales in interstate commerce, or on interstate commerce itself. To the contrary it has continuously been held to be directed only at local activities taking place within the boundries of this state. Graves v. State, 258 Ala. 359, 62 So.(2d) 446; Haden v. Olan Mills, 273 Ala. 129, 135 So.(2d) 338; Olan Mills, Inc. of Tennessee v. City of Opelika, Alabama, et al, 207 F. Supp. 332 (1962).

5.

THE GREAT MAJORITY OF CASES OF THIS COURT RELEVANT TO THE SUBJECT MATTER WOULD SUSTAIN THIS LICENSE TAX AS HELD TO BE DIRECTED AT LOCAL ACTIVITIES TAKING PLACE WITHIN THE TAXING STATE.

The federal cases cited by the Appellant under its topic No. 5 and on page 20 of its Jurisdictional Statement, namely, the Nippert case, Spector Motor Service, Inc. v. O'Connor, 304 U.S. 602, and Railway Express Agency, Inc. v. Commonwealth

of Virginia, 347 U.S. 359, have all been discussed in detail and clearly distinguished from the case at bar from the standpoint of the law and the facts in at least two instances in this brief, so we believe that that will suffice to show that the facts of those cases are entirely different from the facts of this case, and that the doctrines of those cases are not applicable or relevant to the situation here. The same is also true as to the state court cases which the Appellant has also cited and discussed under its topic No. 5 on pages 20 and 21 of its Jurisdictional Statement. Those cases also all involve different facts or different statutes and taxes which were held to be levied on or directed at solicitations or selling. In fact the Supreme Court of Alabama has in both the Graves case (62 So.(2d), at pages 449 and 450) and in the Haden case (135 So.(2d), at pages 389 and 390), very clearly distinguished those cases from the facts and circumstances here involved.

Actually the case of Commonwealth v. Olan Mills, Inc., 196 Va. 898, 86 S.E.(2d) 27, is the only case cited by the Appellant under its said topic "5," which might be said to have any material identity in fact or similarity in statute.

However, in said Olan Mills, Inc. case there is a very serious difference:

> "McCarter, the individual here charged, was not even a cameraman; he was a solicitor."
> (Emphasis Supplied)
> 86 S.E. at page 29.

This alone seems to make said Olan Mills, Inc. case (86 S.E.(2d) 27), fall within the scope of the other cases cited by the Appellant, which turn on the fact that the taxing statutes involved therein were either held to be directed at "solicitations" or at sales made in interstate commerce.

In said Virginia case the Virginia court construed the Virginia statute ("as it had a right to do") entirely differently

from the way that the Alabama court has repeatedly construed the Alabama statute involved (Title 51, Section 569, supra). That is, the Alabama court has repeatedly held the Alabama License Tax on "traveling and transient photographers" to be directed at the conduct of such photographers in this state in conducting the sittings and taking the pictures, regardless of whether the photographer comes from within the state or from without the state. Cases upholding the license tax as so directed, and considering it to be a tax on local activities, which can be reasonably separated from the interstate activities, in addition to the holding of the Alabama court in this case are:

Graves v. State, 258 Ala. 539, 62 So.(2d) 446 (1953).

Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388 (1961).

Olan Mills, Inc. of Tennessee v. City of Opelika, Alabama, et al., 207 F. Supp. 332 (1962).

Lucas v. City of Charlotte (4th Cir.) 86 F.(2d) 394, 109 A.L.R. 297.

Craig v. Mills, 203 Miss. 692, 33 So.(2d) 801.

The cases cited by the Virginia court in its decision in Commonwealth v. Olan Mills, Inc. (86 S.E. 27) were the Nippert case (327 U.S. 416), Memphis Steam Laundry Cleaners (342 U.S. 389), and other cases where the taxes involved were said to be laid mainly on "solicitations" or interstate sales.

The Record in this case shows that the orders were procured and solicitations made, not by the employees of the Appellant, Dunbar-Stanley, Inc., but by the local employees of the J. C. Penney Stores located in Alabama. Moreover, the Alabama court in its Opinion in this case (Appendix, Exhibit A, Jurisdictional Statement, page 27) so found:

"We do not find anywhere in the record that the photographer took orders for the pictures. This was done, as we have stated, by Penney employees and mailed to Appellant for acceptance."

(Emphasis Supplied)

As indicated by the Record in this case and also in the United States District Court for New Mexico (Exhibit C, Jurisdictional Statement, page 32) Appellant prices its photographs at fifty-nine cents apiece. It is small wonder that Appellant operates in some 47 or 48 states, etc. Appellant does not pay its way. Local transient photographers, as well as other photographers who pay the local taxes, cannot compete.

The facts of this case do not bear out the holding of the United District Court for New Mexico in the Dunbar-Stanley case there involved (see Exhibit C, Jurisdictional Statement, page 32), that said company was engaged exclusively in interstate commerce. The same is also true in regard to the opinion in Commonwealth of Virginia v. Olan Mills, Inc., 196 Va. 898, 86 S.E.(2d) 27. Those cases do not even consider, and entirely ignore, the decisions of this court in Caskey Baking Company v. Commonwealth of Virginia, 313 U.S. 117, 119, 120, 61 S.Ct. 881, 882, 883, and the other cases cited and referred to by us under the foregoing topics numbered "2" and "3," where this court has upheld license taxes when directed at local events or activities, which can be reasonably separated from the interstate activities. This would also include the pronouncements of this court even in Spector Motor Service v. O'Connor, 340 U.S. 602, at 608, which expressly exclude from the doctrine of that case taxes directed at local activities.

The facts of this case undisputedly show that local employees of the J. C. Penney stores in this state, handled the advertising, solicited the orders for the photograph, and arranged the sittings, and also collected the money from the customers. Penney deducted fifteen percent in each case for

its fee, and sent the rest to the Appellant. Penney also delivered the photographs when finished to the customers. All of these activities also took place solely within this state. No solicitations were made in this state by employees of the Appellant.

At the appointed time, and in the several Penney stores involved, the Appellant's traveling or transient photographers appeared and conducted the sittings and took the pictures or exposures. Such local activities on the part of the Appellant's photographers is the local event at which the Alabama Court has repeatedly held that the license tax involved is directed, and the thing which it hits.

"While the transportation of the bread over the State line is interstate commerce, that is not the activity which is licensed or taxed. The purely local business of peddling is what the tax hits, and this irrespective of the source of the goods sold. It is settled that such a statute imposes no burden upon interstate commerce which the Constitution interdicts (citing cases in support thereof under footnote "3")."

(Emphasis Supplied)

313 U.S. at 119, 61 S.Ct. at pages 882 and 883.

CONCLUSION

There is no substantial question involved. The question posed by the Appellant has already been settled by this Court. There is no need for further review. The opinion and judgment of the Alabama Court should be affirmed, and this appeal dismissed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 376.

DUNBAR-STANLEY STUDIOS, INC.,
a Corporation,
Appellant,

versus

STATE OF ALABAMA,
Appellee.

BRIEF

In Opposition to Motion to Dismiss or Affirm on Behalf of Appellant.

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BRIEF

In Opposition to Motion to Dismiss or Affirm on Behalf of Appellant.

I.

The Motion to Dismiss or Affirm filed by the State in this case is based solely on the ground that the appeal does not present a substantial federal question, thereby eliminating the other possible grounds for such Motion provided in Rule 16 of this Court. It seems to be conceded that the question decided by the Supreme Court of Alabama in this case is a federal question, and it is not denied that this decision is of significance and substance to the several states in the area of taxation of interstate enterprises. As we read the Motion, the argument advanced for no substance is that the Supreme Court of

Alabama rightly decided the question presented to it. This, of course, we hope to argue extensively on this appeal. But has this Court concluded in any case that a single unitary interstate activity may be fractionalized into parts, and the parts performed within a State be subjected to local licenses?

If so, we have failed to find any such case. **Nippert v. Richmond**, 327 U. S. 416, 423 (1946), says otherwise, as do the other cases cited in the Jurisdictional Statement, page 14:

Nor do any of the cases cited by the State so hold. The fallacy of the holding of the Supreme Court of Alabama, and the position of the State in this Motion, is pointed up on page 15 of the Motion where the State cites the case of **Spector Motor Service v. O'Connor**, 340 U. S. 602, 609, 610 (1951), for the proposition that this Court in that case:

> "* * * recognizes the right of the state to tax local business activities taking place in the state, even though some of the activities connected therewith take place in interstate commerce * * *."

What this Court said in **Spector** was:

> "* * * where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business * * *."

Of course, where a taxpayer, such as a carrier, is engaged in two businesses, one of which is interstate and the other intrastate, the intrastate business may be set apart by the state for local taxation. By far the best statement we have found for this is that by Justice Brandeis in **Sprout v. South Bend**, 277 U. S. 163, 171 (1928), cited on page 18 in the Jurisdictional Statement where he said:

> "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of

> the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

But nothing in these cases, or any others we have found, authorize a state to break up a unitary business transaction into parts, and then pick out the local parts and impose a license tax on them. This, however, is what the Alabama Court did in this case, and the State argues in this Motion that since multi-natured business can be separately taxed, therefore, unitary businesses can be fractionalized for taxing purposes. This we do not recognize to be the law and we know of no authorities which so hold, and **Nippert v. Richmond** says otherwise.

Hence, the breaking up of the photography business into inter and intrastate commerce, and the application of a local license to the intrastate portion of this business, is not in line with decisions of this Court, and such decision is not rightly decided. Since the no substance argument in this Motion is based on the rightfulness of the fractionalization of the photography business, and since such fractionalizing of a unitary business is not rightly decided, there is no basis for the no substance argument.

II.

The State argues several other propositions collateral to its position of no substance to this appeal. Thus, on pages 24-26 in the Motion, it is argued that since the license applied to resident transients as well as non-resident transients, therefore the license was non-discriminatory and it was valid. But the State overlooked completely **Leloup v. Port of Mobile**, 127 U. S. 640 (1888), where the license was on telegraph companies. It was argued that

since it applied equally to companies handling intrastate business as to companies handling interstate messages, it was non-discriminatory and valid. This Court held otherwise. See also the other cases set out on page 19 in the Jurisdictional Statement.

III.

So, the State argues that only the state court may construe a state taxing statute. This is true. But we demur. The state court may not construe a state taxing statute so that it will be unconstitutional. The question here is, did the Alabama Court so construe this photographer's license? If so, as we insist, this appeal should be heard.

IV.

We do not believe that the further arguments by the State against review in this case call for comment from us. The ultimate question in this case is whether or not local businesses can utilize local taxation to prohibit out-of-state competition. Their efforts in this case have been successful so far. We urge this Court to review these cases on their merits, and re-state the constitutional inhibition against such Balkanizing of this Nation.

Respectfully submitted,

.....

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BRIEF ON BEHALF OF APPELLANT.

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BRIEF ON BEHALF OF APPELLANT.

I.

OPINION BELOW.

The opinion of the Supreme Court of Alabama in this case has not yet been reported officially. Unofficially it is reported in 210 So. 2d 696, and a copy is found in the Appendix, p. 37.

II.

JURISDICTION.

The State of Alabama imposed a flat privilege license on Appellant, herein referred to as "taxpayer", as a "transient or traveling photographer", for its activities in Ala-

bama, which taxpayer insisted, and still insists, were in interstate commerce, and therefore, the license constituted a burden thereon prohibited by the Federal Constitution.

The statutory provision believed to confer on this Court jurisdiction of this appeal is 28 U. S. C., Sec. 1257 (2).

The Supreme Court of Alabama affirmed the imposition of this privilege license on taxpayer on May 13, 1968. Notice of Appeal to this Court was filed on July 8, 1968. The appeal was docketed on August 5, 1968. Probable jurisdiction was noted on October 14, 1968.

III.

STATUTE INVOLVED.

The privilege license applied to taxpayer's activities was provided in, and, therefore, the statute whose validity is involved, is:

Title 51, Code of Alabama, § 569,

"§ 569. **Photographers and photograph galleries.** Every photograph gallery, or person engaged in photography, when the business is conducted at a fixed location: In cities and towns of seventy-five thousand inhabitants and over, twenty-five dollars; in cities and towns of less than seventy-five thousand and not less than forty thousand inhabitants, fifteen dollars; in cities and towns of less than forty thousand and not less than seven thousand inhabitants, ten dollars; in cities and towns of less than seven thousand and over one thousand inhabitants, five dollars; in all other places whether incorporated or not, three dollars. The payment of the license required in this section shall authorize the doing of business only in the town, city or county where paid. For each transient or traveling photographer, five dollars per week."

The License Code of Alabama provides that the amounts set out therein are levied for the use and benefit of the State. It also provides in Title 51, Code of Alabama, § 831 (c):

> "(c) There is hereby levied for the use and benefit of and to be paid to the county in which the license is issued, in addition to all license taxes levied under the provisions of article 1 of chapter 20, for state purposes and which are payable to the judge of probate or commissioner of licenses, a sum equal to fifty percent of the amount levied for State purposes, except as otherwise specifically provided."

There were no other provisions applicable in this case, therefore the license here was computed for each county where taxpayer operated:

For the State	$5.00 per week
For the county	2.50 per week
	$7.50 per week

The annual state photographer's license on those engaged in business "at a fixed location" in the cities where taxpayer operated is:

Andalusia	$10.00
Anniston	10.00
Birmingham	25.00
Decatur	10.00
Dothan	10.00
Jasper	10.00
Prichard	15.00
Mobile	25.00

The assessments in this case were for

One half year—April, 1963-September, 1963;
One year—October, 1963-September, 1964;
One year—October, 1964-September, 1965.

Had taxpayer obtained a state photographer's license for engaging in business "at a fixed location" for these periods in Birmingham, it would have been:

One-half year	$12.50
One year	25.00
One year	25.00
	$62.50

Since taxpayer had been in Birmingham during 22 weeks in this period, the actual license assessed against taxpayer for benefit of the State for operating in Birmingham for this period was $110.00, about twice what it would have been had taxpayer been licensed to operate "at a fixed location."

The nature of the license granted is provided in Title 51, Code of Alabama, § 840, which provides:

> "§ 840. **License deemed a personal privilege.**—(a) Every license shall be held to confer a personal privilege to transact the business, employment or profession which may be the subject of the license, and shall not be exercised except by the person, firm or corporation licensed, unless specifically authorized by law to do so. (b) A business or privilege for which such license is issued is, under actual sale, transferred to a new ownership in which case a transfer of license may be effected by application to the probate judge originally issuing such license and the payment of a fee of fifty cents."

With these provisions, attention is drawn to part of the first sentence, in Title 51, Code of Alabama, § 831, which provides:

> "§ 831. **License, procurement of; form of license.**—Before any person, firm, or corporation shall engage in or carry on any business or do any act for which

a license by law is required, he, they, or it, except as otherwise provided, shall pay to the judge of probate of the county in which it is proposed to engage in or carry on such business or do such act, or to the commissioner of licenses or the state department of revenue, as specifically the amount required for such license, and shall comply with all the other requirements of this title; * * *."

IV.

QUESTIONS PRESENTED.

Taxpayer is engaged in the business of soliciting orders for and taking baby pictures throughout the country, out of Charlotte, North Carolina, operating in and using the facilities of a nation-wide chain of department stores (J. C. Penney Company). The City of Mobile, Alabama, sought to impose a discriminatory privilege license tax on these activities (as more fully appears in the related case, **Dunbar-Stanley Studios, Inc. v. City of Mobile**, which is appealed with this case) and then the State of Alabama sought to impose the license tax quoted above on these same activities. The questions presented in this case are:

(1) whether or not the unbroken chain of interstate activities here involved may be fractionalized into parts on which state licenses may be imposed;

(2) whether or not these activities in interstate commerce are subject to this flat, fixed sum, unapportioned privilege license tax as a condition precedent to the performance of this interstate activity in the State of Alabama; and

(3) whether or not the applicability of a weekly rather than an annual license, increasing the amount exacted, can be made dependent upon interstate activity?

V.

STATEMENT OF THE CASE.

Taxpayer had operated openly at the J. C. Penney Company stores located in eight cities in Alabama, since 1963 with no hindrance or notice from the State of Alabama, and without being assessed any privilege license by the State Department of Revenue or anyone else under the statutes noted in III above (A. 4, 7). On August 31, 1965, the City of Mobile amended its photographer's license schedule to impose a license on taxpayer of $50.00 per day. To prevent the imposition of this license, taxpayer commenced a declaratory judgment proceeding in the State Court to test the validity of this license, all as appears more fully in the related case of **Dunbar-Stanley Studios, Inc. v. City of Mobile**, No. 377, pending in this court.

Thereafter, on May 19, 1966, the State Department of Revenue assessed the privilege license quoted in III above, against taxpayer for the operations in Mobile and seven other cities in Alabama not only for the license for that year, but for licenses for prior years to 1963 (A. 2, 3, 6). From this assessment, an appeal to the circuit court of Montgomery County, Alabama was taken (A. 6, 7).

From the pleadings and oral testimony taken in open court it was developed that taxpayer was engaged in the photography business in Charlotte, North Carolina, specializing in photography of chiildren (A. 3, 7). It had no office, inventory, developing laboratory or agent in Alabama (A. 3, 16). J. C. Penney Company was a department store which entered into an agreement for taxpayer to engage in taxpayer's photography work in the Penney stores, some of which were in Alabama (A. 4, 17, 18). The dates of visits by taxpayer's photographers were fixed by the local Penney store managers (A. 5, 22). Newspaper ad-

vertisements were run by Penney (A. 4, 18), but its cost was deducted from the gross receipts (A. 21). Taxpayer prepared postal cards notifying its customers of the visits, which were mailed out by Penney (A. 29).

Taxpayer's photographers then came into Alabama, solicited orders for pictures, took pictures, returned the exposed film to Charlotte, with the customer's orders for pictures, and if the orders were accepted, the pictures were developed, printed and finished (A. 4, 5, 9, 18, 19). The finished pictures were returned to the Penney stores where they had been taken, and they were paid for and picked up by the customer (A. 5, 18, 19). The payments were made to the Penney employees only, and not to taxpayer's photographers or agents (A. 5, 18, 19).

Penney retained a percentage of the receipts as its commission, and after deducting expenses, remitted the balance to taxpayer (A. 21). Penney did no photography work in Alabama (A. 5, 24). This was done by taxpayer on Penney's premises, though subject to Penney's store rules as to hours, time, place, etc., of taking the pictures (A. 5, 23, 24).

VI.

SUMMARY OF ARGUMENT.

I.

State Fractionalizing of Interstate Commerce and Licensing Essential Elements Is Prohibited by the Commerce Clause in the Federal Constitution.

1. State Fractionalizing.

In **Graves v. State**, 258 Ala. 359, 62 So. 2d 446 (1953), the Supreme Court of Alabama applied the state photographer's license to one engaged only in exposing film. In **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388 (1961), the Court affirmed this even though there were solicitors as well as proof-displayers in the case.

In the case at bar though taxpayer's representative performed all of the functions of the photographer within the State, the Court separated out of the single transaction the exposure of film, and applied the license to that.

Since interstate commerce must be performed within the states, if the states may carve it up into "local incidents" and license each such incident separately, state lines would become impediments to intercourse between the states.

> **Memphis Steam Laundry v. Stone**, 342 U. S. 389, 395 (1952).

In the drummer license cases, this Court held that the states cannot separate out solicitation of interstate sales for licensing,

> **Nippert v. Richmond**, 327 U. S. 416, 423 (1946),

nor may delivering picture frames be separated out of the business of photography for licensing,

> **Caldwell v. North Carolina**, 187 U. S. 622 (1903),

nor selling picture frames,

Dozier v. Alabama, 218 U. S. 124 (1910),

nor can "taking" gas be split off from taking and transporting gas in interstate commerce.

Michigan-Wisconsin Pipe Line v. Calvert, 347 U. S. 157, 169 (1954),

nor can soliciting and delivering be set apart out of interstate wholesale grocery business and licensed.

West Point Grocery Co. v. Opelika, 354 U. S. 390 (1957).

2. Licensing Essential Elements.

An integral part of the interstate process which cannot realistically be separated from it, cannot be separately licensed by the states under the Commerce Clause.

Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 422, 429, 433 (1947);

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 166 (1954).

Exposing film is an essential element in photography. Therefore, licensing exposing film is licensing the photography business.

Photography across a state line is an interstate transaction. But interstate transactions cannot be licensed.

Memphis Steam Laundry v. Stone, 342 U. S. 389, 393 (1952);

Crutcher v. Kentucky, 141 U. S. 47, 58 (1891);

Spector Motor Service v. O'Connor, 340 U. S. 602, 608, 609 (1951).

3. Distinguish Multiple Businesses From Single Activity.

Regardless of whether or not multiple businesses may be separately licensed, **Spector Motor Service v. O'Connor**,

340 U. S. 602, 609 (1951), there is no authority we have found outside this case splitting up into parts a single business activity. But even when the multiple businesses are sought to be separately licensed, the licenses must be

1. Solely on intrastate business,
2. Not increased for interstate business,
3. Not on one solely in interstate business,
4. So that taxpayer can discontinue intrastate business without withdrawing from interstate business.

Sprout v. South Bend, 277 U. S. 163, 171 (1928).

The license in this case flunks these tests.

II.

Flat-Sum Privilege Tax on an Essential Element of an Interstate Activity Is Prohibited by the Commerce Clause in the Federal Constitution.

1. Flat-Sum Privilege Taxes Are Exclusory.

West Point Grocery Co. v. Opelika, 354 U. S. 390 (1957).

2. Exclusory Licenses on Interstate Activity Are Void Under the Commerce Clause.

Nippert v. Richmond, *supra*;
Best & Co. v. Maxwell, 311 U. S. 454 (1940).

III.

Licenses Used to Discriminate Against Interstate Commerce Are Invalid Under the Commerce Clause.

1. Legal Discrimination.

Photographers at a fixed location pay an annual license in Alabama. Taxpayer operates at a fixed location but sends the exposed film out of the state for processing.

For this the Supreme Court of Alabama holds that the weekly transient license applies.

> **Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So. 2d 388 (1961).**

This makes the license more expensive than it would be if the out-of-state activity were not engaged in. Such discrimination is fatal to a state license under the Commerce Clause.

> **Robbins v. Shelby County Taxing District, 120 U. S. 489 (1887);**
> **Best & Co. v. Maxwell, 311 U. S. 454 (1940);**
> **Nippert v. Richmond, 327 U. S. 416, 434 (1946).**

2. Factual Discrimination.

On August 31, 1965, the City of Mobile sought to impose a discriminatory license of $50.00 per day on taxpayer alone for each day's operation. This is incomprehensible unless it was brought about by taxpayer's local competitors. The city license was met by litigation. Thereafter, though the State had made no move to require a license from taxpayer for over three years, suddenly the assessments involved in this case were made by the State Department of Revenue on May 19, 1966. This is not explainable except as a further effort by competitors to exclude taxpayer from Alabama. The cases in this Court recognize this.

> **Robbins v. Shelby County Taxing District,** *supra*;
> **Nippert v. Richmond,** *supra*.

A fortiori, such discrimination against interstate trade cannot withstand attack under the Commerce Clause.

VII.

ARGUMENT.

State Fractionalising of Interstate Commerce and Licensing Essential Elements Is Prohibited by the Commerce Clause in the Federal Constitution.

1. State Fractionalising.

It will be recalled that in **Graves v. State**, 258 Ala. 359, 62 So. 2d 446 (1953), an employee of Olan Mills, Inc., a non-resident photographer, was prosecuted criminally for failing to have the license sought from taxpayer by the State in this case. Olan Mills had a two-stage operation at that time. It sent solicitors into the State to obtain orders for pictures. Thereafter, the photographer came into the State to fulfill those orders, by exposing film, and then sending the exposed film back to the home office outside Alabama where the film was developed, printed and finished, and the picture was sent directly to the customer. The first question was whether or not merely exposing film constituted the business of photography within the terms of the license. The Alabama Court held that it did. The next question was whether or not this license was imposed on interstate commerce. The Alabama Court held that it did not, distinguishing the drummer license cases in this Court because there the license was on soliciting orders for interstate sales. Graves did not solicit orders, and therefore, the license was not on soliciting, and hence the drummer cases did not apply here.

To clarify the matter, Olan Mills brought a declaratory judgment proceeding in **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388 (1961). It was shown here that Olan Mills actually had a three-stage photography business. The first group passing through the State was the solicitors who took orders and lined up appointments with cus-

tomers to have pictures taken. The second group came through merely fulfilling the commitments and exposing the film. The third group came back into the State with proofs from which the customers selected the pictures to be finished.

The Alabama Court held that this case was governed by the **Graves** case, and since the Alabama license applied to the exposing of film only, this did not run afoul of the drummer cases, and therefore, the tax did not violate the Commerce Clause.

We think the Alabama Court inadequately analyzed and considered the facts in these cases, and misapplied the applicable law to the facts.

Regardless of this, when the case at bar arose, the Alabama Court completely overlooked the fact that taxpayer's photography business is a single unitary transaction. Only one person comes into the State in this case, and this one person obtains the orders for pictures, exposes the film, transmits the exposed film to taxpayer's plant in North Carolina, and moves on. Certainly taxpayer has not fractionalized this interstate transaction into parts.

The Supreme Court of Alabama, however, held that:

(1) The State may fractionalize into parts photography business which runs across state lines,

(2) It may pick out for tax the exposure of film in Alabama, and

(3) This will not infringe on the Commerce Clause.

It was held that the **Graves** and **Haden** cases called for this conclusion.

For a non-resident photographer to divide its business in this State into parts, and have the State seize one of these parts and require a license for it is one situation.

For the State to carve up a single business transaction into parts, and seek to license one of these parts is an entirely different situation. The failure of the Supreme Court of Alabama to appreciate this distinction is unfortunate. In other words, we think this is bad Alabama law.

The question before this Court, however, is the right of the State to isolate into discrete parcels a single interstate activity, and impose a license on one of the essential elements of the transaction. The Alabama Supreme Court held it could. We insist that this is reversible error.

It has been argued in this Court that such fractionalizing of an interstate activity can be done and the parts licensed by a state. This Court answers it in **Nippert v. Richmond**, 327 U. S. 416, 423 (1946):

> "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular

phases or incidents, label them as 'separate and distinct' or 'local', and thus achieve its desired result. "It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax."

See also:

Freeman v. Hewit, 329 U. S. 249, 267 (1947) (concurring Opinion);

Memphis Steam Laundry v. Stone, 342 U. S. 389, 393 (1952);

Railway Express Agency v. Virginia, 347 U. S. 359, 367, 368 (1954).

Insofar as the states have isolated solicitation of orders from sales across state lines, and sought to license such solicitation, this Court has condemned such fractionalizing of interstate sales without exception. In addition to the cases above,

See also: **Robbins v. Shelby County Taxing District**, 120 U. S. 489 (1887). The cases are collected in **Memphis Steam Laundry v. Stone**, 342 U. S. 389, 393, f.n. 7. Also see Lockhart, **Sales Tax in Interstate Commerce**, 52 H. L. R. 617, 618, f.n. 10 (1939).

Efforts to split up sales of pictures across state lines and tax local parts of the transaction began some time ago. In **Caldwell v. North Carolina**, 187 U. S. 622 (1903), the State Court held that a broad license on photographers could be construed in that case to cover an agent who was "delivering picture frames" within the city. Since the delivery within the city was local, the State Court separated this from the photography business generally and held that this construction shielded the license from attack under the Commerce Clause. This Court held that

this effort to split up this transaction to tax the local part was unavailing under the Commerce Clause.

In **Dozier v. Alabama**, 218 U. S. 124 (1910), the drummer's license on photographers covered those selling picture frames as part of their business of photography. The Alabama Supreme Court construed the license to apply to the sale of picture frames within the State, a local activity, and therefore immune from attack under the Commerce Clause. Writing for the Court, Justice Holmes said:

> "We are of opinion that the sale of frames cannot be so separated from the rest of the dealing between the Chicago company and the Alabama purchaser as to sustain the license tax upon it."

Affirmed:

Davis v. Virginia, 236 U. S. 697 (1915).

In **Michigan-Wisconsin Pipe Line v. Calvert**, 347 U. S. 157 (1954), the State sought to license "gathering gas produced" in the State. The pipe line purchased gas and transported it in interstate commerce. The state court held that purchasing gas was included in "gathering" as used in the statute, and since the purchasing preceded the transportation and was local in its nature, the license did not offend the Commerce Clause. In reversing, this Court said at page 169:

> "* * * we think that, as a basis for finding a separate local activity, the incidence must be a more substantial economic factor than the movement of the gas from a local outlet of one owner into the connecting interstate pipeline of another. Such an aspect of interstate transportation cannot be 'carve[d] out from what is an entire or integral economic process', Nippert v. Richmond, supra (327 U. S. at 433), by legislative whimsy and segregated as a basis for the tax. The separation must be realistic."

Certainly carving out exposing film from the business of photography is unrealistic, and to permit such mutilation of an entire and integral economic process for purposes of taxation of interstate transactions would undermine the policy of preserving interstate commerce free and unrestricted by state lines.

In **West Point Grocery Co. v. Opelika**, 354 U. S. 390 (1957), the city by licensing ordinance sought to segregate soliciting orders for groceries and delivery within the city from the wholesale grocery business across state lines, and license the soliciting and delivering as local activities. This Court held that such breaking up of this "uninterrupted movement in interstate commerce" could not be done for the purpose of applying a flat-sum privilege license.

Since a state cannot split off sales of frames from sales of pictures across state lines and hang a license on the sale of frames, and it cannot split off solicitation of orders from sales of goods across state lines and hang a license on the solicitation, and it cannot split off purchase from purchase and transporting of gas in interstate commerce, so a state should not split off exposing film from the photography business and hang a license on it, as was done in this case. We can see no difference in principle between the cases for the reasons set out in **Nippert** above.

2. Licensing Essential Elements.

Taxpayer has a plant in Charlotte from which photographers are sent into Alabama, and other places, to take baby pictures. Film is exposed by the photographer in Alabama, and returned to Charlotte for developing, printing, processing, and re-delivery to Alabama. No one has, and in our judgment, no one can argue that Alabama can license taxpayer's activities in Charlotte. Nor can Alabama license the entire process, both that done in Alabama and North Carolina.

The question here is whether or not Alabama may take out of this series of events the single act of exposing film in Alabama, and license that alone.

In **Joseph v. Carter & Weekes Stevedoring Co.**, 330 U. S. 422 (1947) a privilege license measured by gross receipts was imposed on a stevedoring company engaged in loading and unloading ships engaged in interstate and foreign commerce. This Court observed on page 429:

> "The selection of an intrastate incident as the taxable event * * * where the taxable event is considered sufficiently disjointed from the commerce, * * * is thought to be a permissible State levy."

In deciding this case, this Court went on to say on page 433:

> "Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid."

The cases holding that closely related activities to interstate transportation may not be licensed by the states, such as loading or unloading, are collected in **Michigan-Wisconsin Pipe Line Co. v. Calvert**, 347 U. S. 157, 168 f. n. 5 (1954). The reason for these holdings was set out on page 166:

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate proces, the flow of commerce, that it cannot realistically be separated from it."

This is the basis for **Memphis Steam Laundry v. Stone**, 342 U. S. 389 (1952) where the question was whether or not the license was imposed on door-to-door solicitation of laundry. It was argued that since such solicitation had to be local, a license thereon could not affect interstate com-

merce even when the solicitor was from an out-of-state laundry. This Court answered that:

> "If the Mississippi tax is imposed upon the privilege of soliciting interstate business, the tax stands on no better footing than a tax upon the privilege of doing interstate business. A tax so imposed cannot stand under the Commerce Clause."

This has been the rule for many years.

In **Crutcher v. Kentucky**, 141 U. S. 47, 58 (1891), this Court said:

> "We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

The leading case on this today is **Spector Motor Service v. O'Connor**, 340 U. S. 602, 608, 609 (1951), where it was pointed out that even non-discriminatory licenses on interstate commerce are invalid.

Accord:

Barrett v. New York, 232 U. S. 14, 31 (1914);
Memphis Steam Laundry v. Stone, 342 U. S. 389, 392, 393 (1952).

See also:

Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S. 160, 162 (1903);
Alpha Portland Cement Co. v. Mass., 268 U. S. 203, 217 (1925);
Lily & Co. v. Sav-on-Drugs, 366 U. S. 276, 278, 279 (1961).

The basis of this, as stated in **Crutcher v. Kentucky**, 141 U. S. 47, 57 (1891), is that the privilege of engaging in

interstate commerce is given by the national government and not by the states, being "a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States * * *."

Since the photography business must have the exposing of photographic film, a license thereon is a license on the business. Since the photography business engaged in by taxpayer is across state lines, a tax on taxpayer's business must be a tax on interstate activity. This is precisely what the cases above hold is not up for licensing by the states.

The fact, if it were a fact, that the State imposed the same license on exposing film which was developed, printed and processed in Alabama, as that imposed on taxpayer (where the film is developed, printed and processed in North Carolina) will not save this license. These were the facts in **Robbins v. Shelby County Taxing District**, 120 U. S. 489, 497 (1887), and this Court said:

> "Interstate commerce cannot be taxed at all, even though the same amount of the tax should be laid on domestic commerce, or that which is carried on solely within the State."

This has been repeated time and again.

Nippert v. Richmond, 327 U. S. 416, 431 (1946);
Freeman v. Hewit, 329 U. S. 249, 252 (1947).

See also:

Caldwell v. North Carolina, 187 U. S. 622, 629 (1903);
Spector Motor Service v. O'Connor, *supra*.

3. Distinguish Multiple Businesses From Single Activity.

Attention has been directed to the fact that in this case and in **Haden v. Olan Mills, Inc.**, 273 Ala. 128, 135 So. 2d

338 (1961), the Alabama courts failed to appreciate that Olan Mills divided its interstate photography into three parts, which is not true of taxpayer's operations. The Alabama courts also failed to differentiate between a single, unitary interstate activity, such as taxpayer's activity, and multiple businesses carried on by one entity. Of course a taxpayer may engage in interstate commerce, and intrastate commerce and foreign commerce, all at the same time. Thus, in **Osborne v. Mobile**, 16 Wall. 479 (1873), the city imposed three licenses on express companies:

> For those doing only a city business, $50.00 per year;
> For those doing business only within the state, $100.00;
> For those doing business outside the state, $500.00.

This Court held that the $500.00 license was rightly applied to an express company doing business across the state line. It is true that this case was overruled in **Leloup v. Port of Mobile**, 127 U. S. 640, 648 (1888), where a flat license of $225 was imposed on telegraph companies when the taxpayer in this case was engaged in business across state lines. This Court observed:

> "* * * no State has the right to lay a tax on interstate commerce in any form, * * * or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

However, we may assume that the State may be able to tax one part of a multiple business. But it would not follow from this that Alabama may isolate one phase of a continuous transaction across a state line and license that phase.

This was spelled out in **Spector Motor Service v. O'Connor**, 340 U. S. 602, 609 (1951), where it was said:

"This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was **exclusively** interstate in character."

This was followed with:

"Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business * * *."

This right to tax intrastate business was set out in **Sprout v. South Bend**, 277 U. S. 163, 171 (1928), by Justice Brandeis:

"But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

This has been quoted approvingly many times.

East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 470 (1931);

Cooney v. Mountain States Telephone, etc., Co., 294 U. S. 384, 393 (1935);

Pacific Telephone, etc., Co. v. Tax Commission, 297 U. S. 403, 414 (1936).

See also:

Portland Cement Co. v. Minn., 358 U. S. 450, 486 (1959), Dissenting Opinion.

The Supreme Court of Alabama held that the license here involved is on exposing film and this is local or intrastate activity. In order for the tax on it to pass this test, taxpayer should be able to discontinue exposing

film without withdrawing from the photography business across state lines. Since this is impossible, the tax imposed on taxpayer in this case cannot pass this test applicable to multiple businesses.

II.

Flat-Sum Privilege Tax on an Essential Element of an Interstate Activity Is Prohibited by the Commerce Clause in the Federal Constitution.

The rule in such cases was stated in **McGoldrick v. Berwind-White Coal Mining Co.**, 309 U. S. 33, 45, f. n. 2 (1940):

> "Fixed-sum license fees, regardless of the amount, for the privilege of carrying on the commerce, have been thought likely to be used to overburden the interstate commerce."

Hence, when a city imposed a flat-sum license fee on the solicitation of orders for sale of goods in interstate commerce, it was held that this license was prohibited by the Commerce Clause in **West Point Grocery Co. v. Opelika**, 354 U. S. 390, 391 (1957):

> "We held in Nippert v. Richmond, 327 U. S. 416, and in Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U. S. 389, that a municipality may not impose a flat-sum privilege tax on an interstate enterprise whose only contact with the municipality is the solicitation of orders and the subsequent delivery of goods at the end of an uninterrupted movement in interstate commerce, such a tax having a substantial exclusory effect on interstate commerce."

1. Flat-Sum Privilege Taxes Are Exclusory.

In addition to the quotations above, this principle has been noted in two other cases in this Court, namely:

Best & Co. v. Maxwell, 311 U. S. 454, 455, f. n. 3 (1940);

Memphis Steam Laundry v. Stone, 342 U. S. 389, 393 f. n. 11 (1952).

But this does not require judicial sanction to make it valid. It is apparent.

To begin a business, various sums are required. Among them is rent, or its equivalent. But this will be graduated according to suitability, location, etc., and it will not all be paid in advance. Wages, with withholdings, social security, employment taxes, etc., are paid after the fact, and will be graduated on volume of business, etc. Ad valorem taxes are payable at the end of the year rather than at its beginning, ordinarily.

Privilege licenses imposed before business can begin will obviously have an exclusory effect. When the admission tax is a flat-sum, it can be prohibitive. For how can the entrepreneur invest substantial sums to commence a business which he has no assurance will survive? This is recognized and fully discussed in **Nippert v. Richmond**, 327 U. S. 416, 428-431.

See also:

Lockhart, **Sales Tax in Interstate Commerce**, 52 H. L. R. 617, 620, 621 (1939);

Lockhart, **State Tax Barriers to Interstate Trade**, 53 H. L. R. 1253, 1276 (1940);

Hartman, **State Taxation of Interstate Commerce**, 46 Va. L. R. 1051, 1095 (1960).

In VIII Law and Contemporary Problems, Spring, 1941, issue on Governmental Marketing Barriers, privilege licenses are described as constituting interstate trade barriers by Paul T. Truitt, in **Interstate Trade Barriers in the United States**, *Id.* 209, 210.

Hence, it is rather apparent now that flat-sum privilege licenses required before interstate activity can commence have the effect of excluding interstate activity.

2. Exclusory Licenses on Interstate Activity Are Void Under the Commerce Clause.

The policy of the Commerce Clause has been set forth in many cases. In **Robbins v. Shelby County Taxing District**, 120 U. S. 489, 494 (1887), it was said at page 494:

> "In a word, it may be said that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems."

In **Memphis Steam Laundry v. Stone**, 342 U. S. 389, 395 (1952), it was stated:

> "The Commerce Clause created the nation-wide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states."

See also:

Passenger Cases, 7 How. 282, 445 (1849);
Developments in the Law—Federal Limitations on State Taxation of Interstate Business, 75 H. L. R. 953, 956-960 (1962).

Therefore, it inevitably follows that if a state tax has an exclusory effect on interstate activity within that state, then this state line would become an impediment to intercourse between the states, and this would violate the basic concept of the Commerce Clause. This flat-sum admission license would require interstate commerce not merely to "pay its way", it would make interstate commerce pay tribute to get into a state. It does not require precedent to establish that this would completely thwart the idea behind the Commerce Clause, however, it was discussed fully in **Nippert v. Richmond**, 327 U. S. 416, 425, where it was said:

> "For, though 'interstate business must pay its way', a state consistently with the commerce clause cannot

put a barrier around its borders to bar out trade from other states and thus bring to naught the great constitutional purpose of the fathers in giving to Congress the power 'To regulate Commerce with foreign Nations, and among the several States * * *.'"

In **Best & Co. v. Maxwell**, 311 U. S. 454, 455 (1940), this Court said:

"The commerce clause forbids discrimination, whether forthright or ingenious."

See also:

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 48 (1940).

Therefore, since a flat-sum admission license is exclusory, the imposition of such a license on interstate business activity is exclusory. State admission licenses excluding interstate businesses make state lines impediments to intercourse between the states. This cannot be done in view of the Commerce Clause.

III.

Licenses Used to Discriminate Against Interstate Commerce Are Invalid Under the Commerce Clause.

1. Legal Discrimination.

The annual state photographer's license on those engaged in business "at a fixed location" in the cities where taxpayer operates is set out above. Taxpayer does its photography business "at a fixed location" in every city where it operates, namely in the stores of J. C. Penney Company. In **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388 (1961), the out-of-state photographers had branch operations in Alabama where photographs were taken, but the exposed film was sent out of the State

and finished pictures were returned to the customers within the State. In passing on the appropriate photographer's license for these operations, the Supreme Court of Alabama said (273 Ala. 132):

> "True, in the branch operation there is a fixed location. But it sends its films back to Chattanooga to be processed and pictures are ultimately made in Chattanooga."

Based on this, it was held that the applicable license was that "required of transient or traveling photographers," or $5.00 per week, rather than $25.00 per year in Birmingham or Mobile for operating "at a fixed location." As noted above, the state photographer's license for operating in Birmingham "at a fixed location" for the period covered by the assessment here involved would have been $62.50. By reason of taxpayer's interstate activity in sending exposed films out of the State to be developed, printed and finished, the transient license at the rate of $5.00 per week for taxpayer's operations in Birmingham during this period was assessed in the amount of $110.00.

This can and will occur in operations by taxpayer in other cities. Hence, operations by taxpayer in Andalusia, Anniston, Decatur, Dothan and Jasper for three weeks, or parts thereof, will subject taxpayer to a higher license than would be due on taxpayer's competitors in these cities even though they both operated from a fixed location. The higher license is imposed on taxpayer because of his interstate activity, namely, sending exposed film outside the State to be processed.

This is, of course, akin to exclusory licenses on interstate activity. If a state may impose a license which will tend to exclude interstate activity, it may exclude the activity. There are no apparent degrees of exclusion available to states. They may exclude or they may not exclude such activity. To permit exclusion for a "small"

degree, or a "reasonable" amount, is incompatible with the Commerce Clause.

Discriminatory licenses based on interstate activity are in the same class. If states may discriminate against interstate activity, they can block it. There are no known or recognized degrees of discrimination against interstate activity.

In fact, the discriminatory nature of the drummers' license in **Robbins v. Shelby County Taxing District**, 120 U. S. 489, was one of the reasons it was stricken. This Court said, page 498:

> "It would not be difficult, however, to show that the tax authorized by the State of Tennessee in the present case is discriminative against the merchants and manufacturers of other States. They can only sell their goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents; and if they had, they are not subject to any tax therefor."

In commenting on the **Robbins** case, in **Best & Co. v. Maxwell**, 311 U. S. 454, 455, f. n. 3 (1940), this Court said:

> "In McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33, we pointed out that the line of decisions following Robbins v. Taxing Dist., 120 U. S. 489, read in their proper historical setting, rested on the actual and potential discrimination inherent in certain fixed-sum license taxes."

This was quoted approvingly in

Nippert v. Richmond, 327 U. S. 416, 421 f. n. 5, and 424.

See also:

Memphis Steam Laundry v. Stone, 342 U. S. 389, 394 (1952).

The latest and most comprehensive statement on this is found in **Portland Cement Co. v. Minnesota**, 358 U. S. 450, 458 (1959):

> "It has long been established doctrine that the Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the States. Gibbons v. Ogden, 9 Wheat. 1. In keeping therewith a State 'cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose' such as itinerant drummers. Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 493, 494. Moreover, it is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce, Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602. Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U. S. 389; Nippert v. Richmond, 327 U. S. 416, or by subjecting interstate commerce to the burden of 'multiple taxation', Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157; J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307. Such impositions have been stricken because the States, under the Commerce Clause, are not allowed 'one single-tax worth of direct interference with the free flow of commerce.' Freeman v. Hewitt, 329 U. S. 249, 256."

See also:

Hartman, **State Taxation of Interstate Commerce**, 46 Va. L. R. 1051, 1114 (1960);

Developments in the Law—Federal Limitations on State Taxation of Interstate Business, 75 H. L. R. 953, 962, 963 (1962).

Since the Alabama Court held in this case that by reason of taxpayer sending exposed film outside the state for processing, the weekly transient rather than the annual license applied, this construction discriminates against interstate activity. Had taxpayer sent the exposed film elsewhere in Alabama rather than to North Carolina, this odd construction of this license would not have applied, and since taxpayer actually operated "at a fixed location" factually, this weekly charge discriminates against taxpayer, and because of interstate activity.

Discriminatory treatment of interstate activity violates the Commerce Clause, and therefore since the construction of this license discriminates against interstate activity, it cannot withstand attack under the Commerce Clause.

2. Factual Discrimination.

From the pleadings and proof in this case, it appears that taxpayer has operated openly in Alabama for several years without being called on for the license imposed in this case. As appears from **Dunbar-Stanley Studios v. City of Mobile**, No. 377, presently on appeal in this Court, the City of Mobile amended its license schedules on August 31, 1965, to impose a license of $50.00 per day on the operations of taxpayer in Mobile. It was alleged in that suit for declaratory judgment that this was amended for the express purpose of imposing this prohibitive license on taxpayer. It was after the declaratory judgment suit was commenced, and an agreement between taxpayer and the City Commissioners had been made permitting taxpayer to continue operations *pendente lite*, that the State Department of Revenue discovered taxpayer and commenced these proceedings for current and escape licenses.

It is not alleged that this action of the City was instigated by taxpayer's competitors, but it is a fair inference that such was the case. Otherwise, why would the City

amend its license schedule to "catch" one taxpayer? Unless pressure were applied, it is highly unlikely that the City would take such action for one non-resident taxpayer.

It is also a fair inference that the State Department of Revenue was aroused into action by these same competitors. Ordinarily, the State approaches an unlicensed concern with a simple request that the appropriate license be obtained. If it is obtained, ordinarily the State takes no further action except to see that the license is taken out in future years.

For non-residents, the State may invoke criminal penalties to insure presence of the taxpayer, as in **Graves v. State**, 258 Ala. 359, 62 So. 2d 446 (1953), but ordinarily the license sought is for the current year.

In the case at bar, the State suddenly discovered taxpayer, who had been running newspaper advertisements in most of the cities in the State for several years, and levied assessments to the limit of the law. The question is apparent: what stung the State into such drastic action? The most obvious explanation is political pressure.

This Court thought this was the explanation of the license on non-resident drummers in **Robbins v. Shelby County Taxing District**, 120 U. S. 489, 498, saying:

> "This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. "And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a State can, in this way, impose restrictions

upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it."

The purpose of these taxes to protect local business from out-of-state competition was recognized in **Best & Co. v. Maxwell**, 311 U. S. 454, but was spelled out in **Nippert v. Richmond**, 327 U. S. 416, 434:

"The tax here in question inherently involves too many probabilities, and we think actualities, for exclusion of or discrimination against interstate commerce, in favor of local competing business, to be sustained in any application substantially similar to the present one. Whether or not it was so intended, those are its necessary effects. Indeed, in view of that fact and others of common knowledge, we cannot be unmindful, as our predecessors were not when they struck down the drummer taxes, that these ordinances lend themselves peculiarly to creating those very consequences or that in fact this is often if not always the object of the local commercial influences which induce their adoption. Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against."

See also:

Lockhart, **Sales Tax in Interstate Commerce**, 52 H. L. R. 617, 621 (1939);

Lockhart, **State Tax Barrier to Interstate Trade**, 53 H. L. R. 1253, 1276 (1940);

Hartman, **State Taxation of Interstate Commerce**, 46 Va. L. R. 1051, 1095 (1960);

Developments in the Law—Federal Limitations on State Taxation of Interstate Business, 75 H. L. R. 953, 963 (1962).

Compare Isaacs, **Barrier Activities and the Courts,** in VIII Law and Contemporary Problems 382, 383 (1941), where the author observed:

> "Almost every extension of the licensing power of a state to a new industry is traceable to the wishes of men in that industry. Many of these have readily believed that they were working for higher standards of training, character and responsibility in their trade or profession. Actually, they were at the same time succeeding in keeping the 'outs' out, and thus limiting their own competition."

Of course, this relates to licensing under the police power, but it also indicates that local businesses have a tendency to create trade barriers to stifle competition even though they may believe their motives are pure. In the case at bar, the inference is irresistible that the motive in "sicking" the state on taxpayer was monopolistic and for the purpose of eliminating taxpayer as a competitor.

Since this admission license was suddenly developed as a result of a clear effort to exclude taxpayer from doing business in Alabama across State lines, and since these licenses lend themselves to such discrimination, this license should be stricken and this case should be reversed and rendered.

VIII.

CONCLUSION.

Since the Alabama Court fractionalized a single interstate transaction and sought to license an essential local element in the transaction, in violation of the Commerce

Clause, this case should be reversed and the assessment of this license should be invalidated. Furthermore, the legislature sought to impose a flat-sum privilege license on interstate activity. The effect of this is to exclude interstate activity and discriminate against it. This cannot withstand attack under the Commerce Clause. Therefore, this Court should reverse this case and hold for naught the assessment under this invalid statute. Since this license has been held by the Alabama Court to discriminate against interstate activity by requiring a weekly transient license for it, not required of intrastate activity, this Court should reverse this case and hold this construction of the photographer's license in Alabama, void, and set aside the assessment of the license on taxpayer.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 376

DUNBAR-STANLEY STUDIOS, INC.
a Corporation,
Appellant,

versus

STATE OF ALABAMA,
Appellee.

BRIEF ON BEHALF OF APPELLEE.

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BRIEF ON BEHALF OF APPELLEE.

I.

OPINIONS BELOW.

The Appellant's brief in this cause is replete with what the Appellee considers to be inaccuracies and contains several irrelevant and impertinent statements. Despite the foregoing, however, we can agree with the Appellant that the opinion below is unofficially reported in 210 So.(2d) 696, and a copy of such is found in the Appendix at page 37. The decree of the trial court is found in the Appendix at page 35.

The opinion of the Supreme Court of Alabama in this case, is predicated on two former decisions of the Alabama court which involved facts which are similar, and wherein the issues involved are practically the same. See **Graves v. State**, 258

Ala. 539, 62 So.(2d) 446 (1953), and **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So.(2d) 388 (1961).

In the **Graves** case, Graves was a traveling photographer for Olan Mills, Inc. And while the transient photographers in **Graves** and **Haden** were represented by able and distinguished counsel they chose not to appeal the decision of the Alabama court to this Honorable Court. See also **Olan Mills, Inc. of Tennessee v. City of Opelika, et al**, 207 F.Supp. 332, 335 (1962), wherein the United States District Court M.D. Alabama, E.D., gave its approval to the doctrines of both **Graves** and **Haden**. The District Court also relied upon the case of **United Gas Pipeline Company v. Ideal Cement Company**, 369 U.S. 134, 82 S.Ct. 676, in holding that it was the duty and prerogative of the courts of the state to define the characteristics and the authoritative meaning of state license and tax statutes. This the Alabama Court has done as to that part of Title 51, Section 569, Code of Alabama 1940, which levies a license tax on a "transient or traveling photographer," over a span of some fifteen years.

The determination made in this respect by the Supreme Court of Alabama in **Haden v. Olan Mills, Inc.**, supra, 135 So.(2d) at page 390, which is also typical of the conclusions reached in said other cases, in defining the characteristics and authoritative meaning of Title 51, Section 569, Code of Alabama 1940, to the extent of that statute levying the license tax on a "transient or traveling photographer," is as follows:

> "As we have shown above, we feel that the conduct of the photographer in this state is a separate and distinct incidence upon which the tax falls."

The Alabama court then has repeatedly defined the statute insofar as it relates to a "transient or traveling photographer," to be a license tax on the individual transient photographer, and for the privilege of such photographer carrying on his profession in a county or counties in this state where he has no fixed

place of business and to be so directed on the activities of such individual photographer in this state, consisting mainly in his conducting the sittings and in his taking the pictures or exposures with his camera. **Graves** (1953), supra, 62 So.(2d) at page 389; **Haden** (1961), supra, 135 So.(2d) at page 390, **Olan Mills, Inc., of Tennessee** (1962), supra, 207 F.Supp. at page 335.

II

JURISDICTION

We disagree with the statement made by the Appellant in the first paragraph of its statement as to "jurisdiction," and which is found on page one of its brief, to the effect that the State of Alabama imposed a flat privilege license on Appellant "as a transient or traveling photographer," for its activities in Alabama. The thing which has been imposed by the Legislature here is not a license in the strict sense of the word. It is simply a tax. The tax in this respect is in effect not a lump sum tax. It is actually a graduated tax of five dollars a week for each week that an individual transient or traveling photographer carries on his profession in a specific county in Alabama, where he does not have a fixed or regular place of business. And it matters not whether such photographer comes from another county in Alabama or from without the state, or has a fixed location in another county or counties in this state, he is required to pay said state tax of five dollars a week in each county in this state in which he carries on his profession and in which he has no fixed or regular place of business. **Graves v. State**, 258 Ala. 359, 62 So.(2d) 446, at pages 448 and 449.

Such tax as is shown by the final assessments which were made by the State of Alabama against the Appellant in this case, and which formed the basis for the appeals in the courts below, were not made because of the Appellant's alleged

solicitations, sales or overall activities, but were made against the activities of Appellant's traveling photographers in this state, and which were confined in this connection to said photographers conducting the sittings and taking the pictures or exposures of the customers with their cameras. Actually that was the extent of said transient or traveling photographer's duties or activities in Alabama from what the evidence in this case discloses. It is true that the transient photographers were the agents and employees of the Appellant, but it was the activities of such photographers in Alabama at which the license tax on transient photographers was directed, and the photographers were the persons whom the tax hit. An examination of the assessments made by the state in this respect will disclose that these assessments were based on the activities of each transient or traveling photographer in Alabama, and in each county in this state where such photographers operated, and where neither they nor the company maintained a fixed or regular place of business. Thus, the Appellee contends, and the Alabama Courts have so held as has been pointed out under "Opinions Below," that under the circumstances, said transient photographer's license tax was not directed at interstate commerce, but at the conduct and activities of such photographers, which took place within the State of Alabama.

With the exception of the foregoing and wherein the Appellee has denied the correctness of what the Appellant has said in the first paragraph under this topic, Appellee has no quarrel with what the Appellant states under the second and third paragraphs under "Jurisdiction," as appearing on page two of Appellant's brief.

III

STATUTE INVOLVED

The license tax statute wherein the license tax levied by the Alabama Legislature on a "transient or traveling photographer"

is included as a separate and distinct levy and tax is found in the last sentence of Title 51, Section 569, Code of Alabama 1940, Recompiled 1958. The statute was amended in 1967, but we are not concerned with the amended Act in this case. Title 51, Section 569, supra, has been quoted in its entirety under "Statute Involved," page 2 of the Appellant's brief, so we will not reiterate here.

The pertinent part of Section 569, supra, which levies the separate and distinct license tax on transient photographers, with which we are concerned, is as follows:

> "For each transient or traveling photographer, five dollars a week."

The separate license tax on photographers with fixed locations within the county or photograph galleries is contained in the first part of Section 569, supra, and is a different tax from that levied under the same Code Section on a "transient or traveling photographer."

The law is well established that both the Congress and the State Legislatures have the right to set up classes, and even subclasses, for the purpose of taxation, and where the tax is applied equally to all within the class or the subclass, and there is any possible reason or basis for distinction or for setting up a particular class or subclass, that such statutes are to be sustained under the Due Process of Law and Equal Protection of the Laws Clauses of the Constitution. **Carmichael v. Southern Coke and Coal Company** (1937) 301 U.S. 583, 57 S.Ct. 868; **Clark v. Paul E. Gray, Inc.** (1939), 306 U.S. 583, 59 S.Ct. 744; **Federal Power Commission v. Tuscarora Indian Nation** (1960), 362 U.S. 99, 80 S.Ct. 543. This would appear to be just as applicable under the Commerce Clause of the Constitution. **Caskey Baking Company v. Commonwealth of Virginia** (1941), 313 U.S. 117, 61 S.Ct. 881. **Wagner v. City of Covington** (1919), 251 U.S. 95, 40 S.Ct. 93; **Armour & Co. v. Commonwealth of Virginia** (1918), 246 U.S. 1, 38 S.Ct. 267.

There is certainly a clear distinction between a photograph gallery and one who follows the profession of a transient or traveling photographer, going from county to county in this state, and following his profession therein, and in which counties they have no fixed place of business. It makes no difference whether a photographer has a fixed place of business in Montgomery County or any other county in Alabama, if he sends photographers out to other counties in this state to conduct sittings and take pictures or exposures as a part of such business, then such photographers are subject to said license tax in each county in which they so operate, and where said photographer has no fixed place of business. The same would also be true as to photographers, who so operate, and who come from Chattanooga, Tennessee, or points in North Carolina, or in other states. For the purpose of this license tax the State of Alabama has treated all of them equally, and there is certainly no evidence in this case to the contrary, although the burden of proof was on the Appellant in the lower courts. There also appears to be a good reason to put "transient or traveling photographers" in a separate class for the purpose of taxing them. In addition, there is absolutely no evidence in this case that there has been any discrimination within the class or the subclass, if it is to be called that, or that all transient or traveling photographers have not been treated equally in the levy and application of this tax by the State of Alabama, whether coming from within or without this state. Graves v. State, 258 Ala. 359, 62 So.(2d) 446, and discussion under footnotes 2 and 3 at pages 448 and 449.

Title 51, Section 569, supra, being one of the business, occupational and professional privilege or license taxes, is also subject to the general provisions applicable to all such privilege or license taxes which are contained in Title 51, Chapter 20, Articles 1 and 13, Code of Alabama 1940, Recompiled 1958. The Appellant has quoted some few of these general provisions under this topic in his brief.

IV

QUESTIONS PRESENTED

The questions as represented by the Appellant under this topic in its brief are for the most part purely hypothetical and are not in keeping with the actual facts involved. The evidence in this case shows that the solicitations were made by the employees of the local J. C. Penney stores, and there were no orders taken or solicitations made in this state by the Appellant or by Appellant's photographers. (Appendix, pages 4 and 5, 18, et seq.)

> "We do not find anywhere in the record that the photographer took orders for the pictures. This was done, as we have stated, by Penney employees and mailed to Appellant for acceptance." (Appendix, page 39)

The Appellant's statement to the contrary under this topic and on page 5 of its brief, insofar as it relates to the Appellant's activities in this state, then is incorrect, and is contrary to the facts and the record.

The Appellant under this topic, and also persistently throughout its brief, seeks to show a similarity or relationship between this case and that of Dunbar-Stanley Studios, Inc. v. City of Mobile (No. 377). This is obviously done by the Appellant to confuse the real issues in this case and to prejudice the minds of the court into thinking that there was some kind of evil conspiracy between the city and the state to put the Appellant out of business. The attempt made by the state to collect the tax from the Appellant as to the activities of its photographers in this state in operating in some nineteen counties in this state, related only to what it was required to do under the State License Tax Statute, and what it had done, and was required to do, in the case of all other "transient or traveling" photographers operating in this state, whether they come from within or without the state. We know of no reason after the activities of the Appellant's photographers were

detected, why the state should have treated the Appellant's "transient or traveling" photographers any differently from all the others (whether coming from within or without the state) in this respect.

The Mobile City Ordinance, as can be seen by a reference to the briefs and the record in Case No. 377, is entirely different from the license tax levied by the state under Title 51, Section 569, supra, on "transient or traveling" photographers. The one has absolutely nothing whatsoever to do with the other, and there is no connection whatsoever between the two. The Alabama Court recognizing this to be the case, refused to allow the cases to be consolidated even for the purpose of oral argument, when the cases were submitted (entirely separately) in that court.

The Appellant's remarks in this connection then are completely dehors the record and are purely prejudicial.

The alleged questions stated by the Appellant to be the questions involved under this topic of its brief appear to be purely hypothetical and not to be related to the real facts in the case. They are, therefore, unacceptable insofar as the Appellee is concerned.

From the facts spring the questions, particularly in this kind of a case. The facts being set out in the Appendix, we are actually hesitant on our part to state what the questions appear to be in the light of this court's long years of experience in treating with the various problems which have arisen under the Commerce Clause. Moreover, this court has repeatedly held in decisions too numerous to recount that such cases are to be decided on their own specific facts.

The court below (Appendix, page 39) stated the questions to be:

> "The contention of appellant is that it was operating through the channels of interstate commerce, and was exempt under Article 1, Section 8, Constitution of the

United States, which empowers Congress to regulate commerce among the several states. Appellant insists that the taking of the pictures, or exposing the films, was just a link in a chain of events that constituted an interstate transaction, and that it took all the activities enumerated above to constitute engaging in business as a photographer; hence, the license had to apply to all of it, or there would be no activity to which the license would apply. It insists that this activity, consisting of soliciting orders for out of state activity ending in delivery into the State, is a continuous stream or flow of events which meets the definition of interstate commerce.

"Appellee insists that no exemption obtained, and that appellant in exposing the films and taking the pictures of the children was engaged in a taxable event under Section 569, supra, and was subject to the flat tax imposed by said section."

It is the contention of the Appellee that the license tax under Title 51, Section 569, supra, is directed at the "transient or traveling" photographer and his following his profession in this state, and his activities in this state, which can be reasonably and realistically separated from the activities which may take place in interstate commerce.

The court below appears to have so decided the question on three different occasions, including the decision in this case. See also **Graves v. State** (1952), 258 Ala. 359, 62 So.(2d) 446, and **Haden v. Olan Mills, Inc.** (1961), 273 Ala. 129, 135 So.(2d) 388.

This will be apparent when the following excerpts from those decisions are considered:

"The distinction between such a situation and that of drummers solociting and procuring sales to be consumated by interstate shipments has been narrowly drawn in express terms, as we have shown . . .

"The license here is not laid on the solicitation of the orders."

(Emphasis Supplied)

Graves v. State, 258 Ala. 359, 62 So.(2d) 446, at page 447 (1952).

"The opinion in the Graves case shows that liability for the license was not based on any act of the solicitors used by Olan Mills, Inc., in obtaining the customers, but was based on the conduct of its photographer who moved about in this state from place to place pursuing his profession . . ."

(Emphasis Supplied)

Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 338, at page 389 (1961).

"As we have shown above, we feel that the conduct of the photographer in this state is a separate and distinct incidence upon which the license tax falls."

Haden v. Olan Mills, Inc., supra, 135 So.(2d) at page 390.

Moreover, this court has held that the authoritative meaning of a state statute is a matter alone for the state courts to decide:

"Who in a particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority."

Alabama v. King & Boozer, 314 U.S. 1, at pages 9 and 10, 62 S.Ct. 43, at page 46.

"The interpretation of state law by the Court of Appeals, in an opinion by its Alabama member, was rendered in advance of construction of the License Code by the courts of the state, which alone, of course, can define its authoritative meaning."

(Emphasis Supplied)

United Gas Pipe Line Company v. Ideal Cement Company, 369 U.S. 134, at page 135, 82 S.Ct. 676, at page 677.

See also **Olan Mills, Inc. of Tennessee v. Opelika, et al**, 207 F.Supp. 332, 334, 335.

V

STATEMENT OF THE CASE

The Appellant in the first paragraph of its Statement of the Case states that it had operated openly at J. C. Penney stores in this state since 1963, without being cited for the license tax by the state. We do not know what this proves. State law in this respect does not require the state to catch those who do not comply with the law, before a particular law or statute is to take effect or become operative. Under the general provisions applicable to the business and professional license taxes, and particularly Title 51, Sections 831 and 834, Code of Alabama 1940, Recompiled 1958, the taxpayer is required to pay the license tax upon the doing of business in this state. These taxing statutes, when read with the particular statute levying the tax, then fix the liability for the tax, and the tax accrues and attaches by operation of law upon the taxpayer engaging in any of such businesses in this state. The fact that the state does not readily detect the taxpayer's activities in this state or fails to catch the taxpayer for a time, does not change the law in this respect, nor does it relieve him from liability. **Griffin, et al v. Edwards**, 260 Ala. 12, 68 So.(2d) 705, at pages 708 and 709.

From the facts the law is made. This appears to be particularly appropriate in cases involving the commerce clause. We will, therefore, give the facts special importance and a substantial amount of space.

The Appellant appears to give little importance to the real facts and makes only brief reference thereto. Even so, the Appellant's Statement of the Case is in part argumentative and contains extraneous matter which is not relevant to the issues, nor can the accuracy of some of its statements be substantiated.

The Appellant's statement that it had no agents in the State of Alabama during the time involved in this case is incorrect. The record shows that during the time involved the Appellant

sent several photographers into Alabama to conduct sittings and to take pictures with their cameras, which activities were conducted locally in Alabama in the space provided for such in some 19 local J. C. Penney Company stores located in some, to wit, 19 different counties in this state.

This is in part disclosed by the record, as follows:

> "Q. In other words, you are primarily involved locally in that your (21) photographers have taken the pictures.
>
> "A. That is correct."
>
> (Appendix, page 33)

In its "Statement of the Case," page 7, the Appellant states that taxpayer's (Appellant's) photographers came into the state and solicited orders for pictures. This is incorrect and untrue and is not supported by the evidence. In fact it is entirely inconsistent with the evidence.

The Appellant in its bill of complaint states the facts to be in this respect, as follows:

> "(2) Advertising for this visit was handled by the J. C. Penney Store, which store also took the orders for pictures, handled all money, and delivered the pictures to to the customers when they were completed.
>
> "(6) The arrangements for the visits by Appellant's photographers and the advertising of the visits are handled and paid for by the local employees of the J. C. Penney stores. The solicitation of the sittings and the location on the premises are made by local employees of the Penney store. The collection of the cost of the pictures and delivery thereof are all handled by the local employees of Penney."
>
> (Emphasis Supplied)
> (Appendix, pages 4 and 5)

The Appellant's activities in Alabama were said by the Appellant in its bill of complaint, to be confined to the following:

"(7) Appellant's activities are limited to taking pictures of persons obtained by Penney, at times and places arranged by Penney * * *"

The employees of the local J. C. Penney Company stores solicited or obtained the customers. (Appendix, pages 4, 5, and 18) There is absolutely no evidence to the effect that Appellant's photographers solicited the orders. Such a statement is misleading and is incorrect.

Mr. Stanley Hoke, President of the Appellant Company best stated the main business of the company as being "a photographic organization making pictures in some forty-eight states." (Appendix, page 15) This is now said to be expanded to fifty states and some foreign countries.

The tax assessment which was the subject of the appeal taken by the Appellant to the Circuit Court in Equity in this cause was made by the State of Alabama against the Appellant in the amount of $225.84, and covered the tax year 1963-1964, and was made as to the activities of the Appellant's individual photographers in conducting sittings and taking pictures in J. C. Penney Company stores located in some 19 counties in this state. The tax was assessed as to each of the individual photographers and as to their activities in this state, and at the rate of five dollars a week as called for by the statute. (Appendix, page 14)

Due to said inaccuracies in the Appellant's Statement of the Case we cannot subscribe to what the Appellant has to say thereunder. Under the circumstances we believe that the facts, in addition to what has already been said, can more fairly and accurately be stated by adopting the findings of fact as made by the Alabama court, viz.:

"Appellant, as we view the pleading and testimony, was a non-resident corporation with its principal place of business in Charlotte, North Carolina, and was so located during the period for which the assessment was made. It

sent a photographer, in its employment, to Alabama, to perform the skilled service of taking children's photographs. The exposed film was sent to the North Carolina studio to be developed and converted into finished photographs, which were sent back to Alabama for delivery to appellant's customers. No photographer engaged in the service was a resident of Alabama.

"It seems that the services relative to certain features of the operation were performed through a contractual arrangement with the parent office of J. C. Penney Company which operates stores in several counties in Alabama. The photographer, under the direction of appellant, visited several of the Penney stores in Alabama during the taxable period here under consideration and performed the photographic service, that is, exposing the films for the purpose of making pictures of the subject children.

"It further appears that the Penney stores caused certain advertising to be done which resulted in the recruitment of customers for the proposed photographic service. Penney also took the orders which were transmitted to appellant in Charlotte for acceptance. When the orders were accepted, the finished product was sent to the Penney store for delivery to the customer and collection of charges therefor. Penney received a percentage of the money so collected and accounted to appellant for the balance. Penney also made accounting reports to appellant and to its home office.

"We might add that appellant prepared cards notifying its customers of the proposed visit of its photographer. These cards were all stamped and mailed by Penney. Penney also did a certain amount of newspaper advertising relative to the photographic service.

"When the photographer arrived at the Penney store, he took the pictures, returned the exposed film to the principal office in North Carolina, where the film was developed, and the picture finished and returned to the Penney store for the delivery to the customer and collection of charges, as above noted. Appellant maintained no office, developing laboratory, or permanent agent in

Alabama. The service of exposing the film on the subject child was performed in Alabama through the photographer, with the equipment temporarily located in Alabama. With the exception of the laboratory work, preparing announcement cards, exposing the films, all the work incident to the photographic service was performed by Penney employees. We do not find anywhere in the record that the photographer took orders for the pictures. This was done as we have stated, by Penney employees and mailed to appellant for acceptance."

(Emphasis Supplied)

Appendix, pages 37, 38 and 39

VI

IN REPLY TO APPELLANT'S SUMMARY OF ARGUMENT AND ALSO ARGUMENT.

Under its "Summary of Argument," brief page 8 et seq., Appellant recites three essentially hypothetical shibboleths, which might fit the circumstances of some cases, but which appear to be very inappropriate and inapplicable under the specific facts of this case.

In fact the Appellant has cited and discussed a number of cases both under "Summary of Argument," page 8 et seq., and "Argument," page 12 et seq. of its brief but none of the cases so cited and discussed fit the facts of this case, nor in any instance are the facts even very similar to the facts of this case. Moreover, and insofar as the decisions of this court are concerned, it is very doubtful that one can be found which would fit the facts of this case, or which would be a controlling precedent.

"The license here is not laid on the solicitation of the orders."

(Emphasis Supplied).

Graves v. State, supra, 62 So.(2d) at page 447.

Moreover, the tax is not directed at sales or selling. These propositions have been repeated by the Alabama court in Olan

Mills, Inc., and in this case. Practically all of the cases cited and relied upon by the Appellant involved "solicitations" and sales purportedly in interstate commerce. Solicitations and sales are not involved here.

It was the late Dr. Jerome Frank who said in his book "Law and the Modern Mind," that law is not an exact science. There is certainly no need to tell this court that if there is one field of law which is more susceptible to Dr. Frank's rather profound statement than any of the others, it is that involving interstate commerce, and particularly that phase of it which is associated with state taxation as applied to persons who do business within a taxing state, but who come from without the state.

1.

ALLEGED FRACTIONALIZING OF INTERSTATE COMMERCE.

The Appellants under this topic speak in general terms of the state fractionalizing interstate commerce for the purpose of taxing an element of it. Actually in this case the tax is clearly and undisputedly levied on the individual "transient or traveling" photographer, and for his carrying on his profession in this state. The conclusive evidence in this respect is that the only activities carried on by the Appellant's photographers in this state was conducting the sittings and taking the pictures. This was also true in the case of the photographers in Graves v. State, 258 Ala. 359, 62 So.(2d) 446 (1953), and Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388 (1961).

The activities at which said license tax is said to be directed is said to be the purely local activities of the photographer in carrying on his profession in Alabama. This has been very appropriately noted by the United States District Court for the Middle District of Alabama in its opinion in Olan Mills, Inc. v. Opelika, et al, 207 F.Supp. 332 (1962), at page 335, as follows:

"The significance of the action by the Supreme Court of Alabama in the **Graves and Olan Mills, Inc.** cases to this particular case now before this Court arises out of the holdings of the Supreme Court of the United States in March of this year when it decided **United Pipeline Company v. Ideal Cement Company**, 369 U.S. 134, 82 S.Ct. 676, 7 L.Ed.2d 623. In the **United Gas Pipeline** case, the Supreme Court held that the federal courts are bound by the decisions of the state courts as to the interpretations of state-taxing statutes, insofar as how the tax is levied and at what the state tax is directed. The Supreme Court in the **United Gas Pipeline** case stated:

> 'The interpretation of state law by the Court of Appeals, in an opinion by its Alabama member, was rendered in advance of construction of the License Code by the courts of the State, which alone, of course, can define its authoritative meaning. * * * Accordingly, the judgment of the Court of Appeals is vacated to permit a construction of the License Code of the City of Mobile, so far as relevant to this litigation to be sought with every expedition in the state courts. It is so ordered. (Emphasis supplied.)'

"It is clear, therefore, that the Supreme Court of the United States says to federal district courts, in instances such as this Court now has before it, that the duty of determining the authoritative meaning of a state-taxing statute is imposed upon the state courts and not upon the federal courts. Such a proposition is particularly applicable here where the Alabama State court has already interpreted the meaning of the Alabama State law * * *"

See also **Alabama v. King & Boozer**, 314 U.S. 1, at pages 9 and 10, 62 S.Ct. 43, at page 46.

In construing the statute the District Court in **Olan Mills, Inc., of Tennessee** (207 F.Supp. at page 335) also pointed out that:

"In each instance, the Alabama Supreme Court construed Section 569 of the state statute to be a tax levied upon and directed at the purely local activities of the photog-

raphers or other representatives of the company taking and processing the pictures in Alabama."

To follow the Appellant's "fractionalizing" theory, the states would be precluded under the commerce clause from levying any kind of license tax on persons who come from without the state and do local business within the state, as each such case might be said to have an element (even though remote) of interstate commerce involved. And certainly it appears that such persons should bear their fair share of state taxation, in enjoying the local markets in competition with local businesses, who are required to pay such taxes. Under the evidence in this case the tax on "transient and traveling" photographers does not discriminate between interstate and intrastate commerce in that it is laid on all transient photographers alike, whether they come from within or without the state. And such activities of the transient or traveling photographers taking place in Alabama could not be subject to multiple taxation, nor could the same activities be subject to taxation in another state. The statute as applied in this case clearly does not burden interstate commerce.

As we, however, read the decisions of this court concerning the subject matter it appears that the "incidence" of the tax, or the thing at which the tax is directed has a great deal to do with whether or not a tax (including a license tax) can be validly levied where allegedly there is a question under the commerce clause.

In **Spector Motor Service v. O'Connor**, 340 U.S. 602 (1951), supra, it was pointed out by this court that it was stipulated by the parties that Spector's transportation business was conducted exclusively in interstate commerce. Thus, this court held that Connecticut's Franchise Tax (a license tax) could not be validly levied on such business as it was exclusively interstate, and as the tax under the circumstances was laid directly on interstate commerce, which is forbidden under the commerce clause.

"The objection to its validity does not rest on a claim that it places an undue burden on interstate commerce in return for protection given by the state. * * *

"The answer in the instant case has been made clear by the courts of Connecticut. The incidence of the tax provides the answer. The courts of Connecticut have held that the tax before us attaches solely to the franchise of the petitioner to do interstate business."

(Emphasis Supplied)

340 U.S. 602, at pages 607 and 608, 71 S.Ct. 508, at pages 511 and 512.

Thus, the decision in **Spector** was based on the premises that Spector was engaged exclusively in the state in interstate commerce, and that the tax attempted to be extracted by Connecticut was laid solely on said commerce. This court, however, in that case stated in effect that had the circumstance been different, the tax might have been sustained.

"Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. **Interstate Oil Pipe Line Co. v. Stone**, supra; **International Harvester Co. v. Evatt**, 329 U.S. 416, 67 S.Ct. 444, 91 L.Ed. 390; **Atlantic Lumber Co. v. Com'r of Corporations and Taxation**, 298 U.S. 553, 56 S.Ct. 887, 80 L.Ed. 1328. The same is true where taxpayer's business activity is local in nature, such as the transportation of passengers between points within the same state, although including interstate travel. **Central Greyhound Lines v. Mealey**, 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633, or the publication of a newspaper, **Western Livestock v. Bureau of Revenue**, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823. See also, **Memphis Natural Gas Co. v. Stone**, 335 U.S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832."

(Emphasis Supplied)

Spector Motor Service v. O'Connor, supra, 304 U.S. at pages 609 and 610, 71 S.Ct. at pages 512 and 513.

Another feature of the Spector decision was that this court recognized therein, like in King and Boozer and in United Gas Pipe Line Company that it is the duty and right of state courts to determine the characteristics of a state tax and to define its authoritative meaning.

> "The answer in the instant case has been made clear by the courts of Connecticut. It is not a matter of labels. The incidence of the tax provides the answer."
> (Emphasis Supplied)

Spector, supra, 304 U.S. at page 608, 71 S.Ct. at page 512.

The Alabama court has repeatedly in Graves, Olan Mills, Inc., and this case construed the license tax statutes involved, insofar as it relates to "transient or traveling" photographers, as follows:

> "The license in both respects is directed against one who pursues the art of photography in Alabama. When a photographer comes into the state, or resides in the state, and moves about in it from place to place, pursuing his profession, he is an itinerant. Shiff v. State, 84 Ala. 454, 4 So. 419, supra. He is then in Alabama rendering some of the essentials of the art of photography as a business, the same as if he had a fixed location here. It is not necessary to perform all the essentials of the art in Alabama to constitute one a photographer subject to license as such in Alabama. The performance of an important feature of it in Alabama is justification for exercising the licensing power. Standard Oil Co. v. City of Selma, 216 Ala. 108, 112 So. 532; Sanford Service Co. v. City of Andalusia, supra. The distinction between such a situation and that of drummers soliciting and procuring sales to be consummated by interstate shipments has been narrowly drawn in express terms, as we have shown. The principle of the drummers' license cases has not been extended by the United States Supreme Court to a situation where there was locally performed an essential physical act in the

performance of a transaction and where the license was directed solely at that local activity, and where it is not laid on interstate transportation nor is an undue burden upon it."

(Emphasis Supplied)

State v. Graves, 258 Ala. 539, 62 So.(2d) 446, at 448 and 449 (1953).

This conclusion reached by the Alabama court in Graves, and also in effect in Olan Mills, Inc. and in this case appears to be supported by the following cases:

Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388 (1961); Olan Mills, Inc. of Tennessee v. City of Opelika, et al, 207 F.Supp. 332 (1962).

Standard Dredging Corp. v. State of Alabama, 271 Ala. 22, 122 So.(2d) 280, appeal dismissed, 364 U.S. 300, 81 S.Ct. 268.

Dorskey v. Brown, 255 Ala. 238, 51 So.(2d) 360, cert. den., 342 U.S. 818, 72 S.Ct. 34.

Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546.

Caskey Baking Co. v. Commonwealth of Virginia, 313 U.S. 117, 61 S.Ct. 881 (1941), and cases cited in Footnote 3 as this case appears in 313 U.S. at page 119, and in 61 S.Ct. at page 883.

Armour & Company v. Commonwealth of Virginia (1918), 246 U.S. 1, 38 S.Ct. 267.

General Motors Corp. v. Washington, 377 U.S. 436, 84 S.Ct. 1546, 1571 (1964).

State of Alaska v. Artic Maid, 366 U.S. 199, 81 St.Ct. 928 (1961).

Memphis Natural Gas v. Stone, 335 U.S. 80, 86, 87; 68 S.Ct. 1475, 1477, 1478 and cases cited (1948).

General Trading Company v. State Tax Commission, 322 U.S. 335, 64 S.Ct. 1028 (1944).

15 C.J.S. 785, Commerce, Section 111(2), and cases cited in footnotes thereunder.

"The incidence of the tax provides the answer * * *"

Spector Motor Service v. O'Connor, 340 U.S. 602, at 608, 71 S.Ct. 508, at 512 (1951).

Alabama v. King & Boozer, 314 U.S. 1, at 9, 62 S.Ct. 43, at 45 (1941).

United States v. Boyd, 378 U.S. 39, 84 S.Ct. 1518 (1964).

2.

THE EXTRACTION INVOLVED IS NOT A PERMIT OR ENTRANCE FEE, IT IS MERELY A TAX.

The licenses levied under Article 1, Chapter 20, Title 51, Code of Alabama 1940, Recompiled 1958, of which Section 569 is a part, show on their face that they are merely business and professional license taxes, which are levied on the privilege of one engaging in one or more of such businesses in this state, and that they are applied only to those doing business in this state. They are in no respect police or regulatory laws. They are merely privilege taxes for the doing of business in this state, and do not give anyone a license to commit a specific act. Cosmus v. Lee, 236 Ala. 396, 183 So. 185, 118 A.L.R. 822. See also United Gas Pipeline Company v. Ideal Cement Company, et al, 277 Ala. 612, 173 So.(2d) 777, 778, and Sun Flower Lumber Company v. Turner Supply Company, 158 Ala. 191, 48 So. 510, 511.

In construing the City of Mobile's License Tax Code applying to businesses, etc., engaged in in that city, which Code had similar provisions to those contained in Article 1, Chapter 20, Title 51, Code of Alabama 1940, Recompiled 1958, and particularly those contained in Sections 450 and 831, as amended, Title 51, supra, the Supreme Court of Alabama in the case of United Gas Pipeline Company v. Ideal Cement

Company, et al, supra, 173 So.(2d) at page 779, characterized such taxes, as follows:

> "The Circuit Court decreed, and this court agrees, that the license fee or tax imposed by said ordinance is for engaging in the business of selling and distributing natural gas in the City of Mobile and its police jurisdiction and does not impose a license tax for entering Mobile to engage in business."
>
> (Emphasis Supplied)

Although included in the same Code section, namely, Section 569 of Title 51, supra, the license tax on photographers and photography gallaries operating from fixed locations in this state and the license tax on "transient and traveling" photographers, are entirely separate and distinct levies.

Despite what the Appellant would have the court believe, the license tax on transient or traveling photographers is levied upon and applied to all transient photographers who travel from county to county in this state and practice their profession, whether such photographers are Alabama residents, who originate their activities in Alabama, or whether they come from without the state. All transient or traveling photographers for the purpose of the levy of the tax or its application are treated alike. Moreover, there is no evidence in this case whatsoever that any transient photographer who comes from without the state and goes from county to county in this state conducting sittings and taking pictures with his camera has ever been discriminated against, or that there has ever been any preferential treatment in the case of the transient photographers who come from within this state.

The Supreme Court of Alabama has in this case and also in the Graves and Olan Mills, Inc., cases repeatedly pointed this fact out.

> "The license in both respects is directed against one who pursues the art of photography in Alabama. When a photographer comes into the state, or resides in the state, and

moves about from place to place, pursuing his profession, he is an itinerant."

(Emphasis Supplied)

Citing Shiff v. State, 84 Ala. 454, 4 So. 419.

State v. Graves, 258 Ala. 539, 62 So.(2d) 446, at pages 448 and 449 (1953).

See also Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388 (1961).

The Supreme Court of Alabama in this case and in the Graves and the Haden cases, supra, has characterized this tax and defined the authoritative meaning of the taxing statute as being a tax directed against "each" photographer, and a transient or traveling photographer and such photographer's activities taking place exclusively in this state.

The Appellant repeatedly urges that actually the license tax here involved, although expressly said by the terms of the taxing statute itself to be a license tax on "each transient or traveling photographer," is directed at "solicitations" and sales taking place in interstate commerce.

The Supreme Court of Alabama not only in this case, but also in the Graves and Haden cases has clearly and unmistakably construed this taxing statute as being directed at the transient photographer and his activities taking place solely in this state, in conducting the sittings and taking the pictures.

"The license tax here imposed is not laid on the solicitation of orders."

(Emphasis Supplied)

Graves v. State, 258 Ala. 359, 62 So.(2d) 446, at 449.

See also Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388, at page 389.

The Alabama Court has said in effect that the transient photographer license tax itself is not laid on sales or selling.

In the Graves opinion (62 So.(2d) at page 449) it is pointed out that Graves, the transient photographer was an employee of Olan Mills, Inc., of Tennessee. That prior to Graves conducting the sittings and taking the pictures, an advanced unit of salesmen (also employees of Olan Mills, Inc.) had solicited and secured contracts for photographs to be made, and that sometime later, and at the appointed time the traveling photographers (a separate and distinct group) would appear and conduct the sittings and take the pictures or exposures. 62 So.(2d) at page 449.

The reference to the "solicitations" in this case having been made by the Appellant is equally as erroneous. The record shows that the solicitations in this case were actually made by the employees of J. C. Penney, who were employed at the local Penney stores in this state, where the traveling photographer sent out by the Appellant later appeared and conducted the sittings and took the pictures or exposures. The appointments therefore were made in advance by the local Penney employees.

The record will also show that the President of the Appellant Corporation testified at the trial in the Circuit Court that the J. C. Penney Company was not considered to be in any respect the agent of the Appellant. That both corporations acted independently in regard to the activities carried on by each. Of course, we realize that whether J. C. Penney Company was the agent of the Appellant in carrying on certain of the activities involved under the facts, would actually constitute a question of law.

The Alabama Supreme Court found (Appendix, page 39) that there were no solicitations in Alabama made by the Appellant's employees, but that the orders for the pictures were actually taken by the local Penney employees.

> "We do not find anywhere in the record that the photographer took orders for the pictures. This was done, as

we have stated, by Penney employees and mailed to Appellant for acceptance."

(Emphasis Supplied)

The foregoing being considered and for purposes material and relevant to the alleged questions in this case, the facts in Graves and Haden appear to be very similar, if not almost identical.

3.

WE AGREE WITH THE APPELLANT THAT ALL CASES INVOLVING ALLEGED VIOLATIONS OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, SHOULD BE DECIDED ON THEIR OWN SPECIFIC FACTS. MOREOVER, THIS APPEARS TO HAVE BEEN THE POLICY OF THIS COURT, JUDGING BY THE DECISIONS OF THE PAST AS WELL AS THE PRESENT.

Our agreement, however, ends in this respect, when the Appellant attempts to draw an analogy between the facts of this case and those involved in **Nippert v. Richmond**, 327 U.S. 416 (1946), **Freeman v. Hewit**, 329 U.S. 249 (1947), **Memphis Steam Laundry v. Stone**, 342 U.S. 389 (1954), and **West Point Grocery Company v. Opelika** (1957), 354 U.S. 390, 71 S.Ct. 1096. The breach even becomes wider when the Appellant attempts to apply the doctrines of those cases to the facts in this case.

The City Ordinance involved in **Nippert** levied a license tax on "Agents - Solicitors - Persons, Firms or Corporations engaged in business as solicitors." 327 U.S. at page 587. In addition it had this very significant provision: "Permit of Director of Public Safety required before license will be issued * * *" This last provision did give the specific license ordinance involved in **Nippert** the earmarks of an entrance fee and regulatory license.

There is a very material difference in the levy of the license in **Nippert** (expressly on "solicitors" and solicitations) and

the state license tax statute involved in **Graves, Haden**, and in this case, the characteristics of which we have already pointed out in some detail. Also, in this respect it is very important to note that neither the State License Tax Statute involved Title 51, Section 569, Code of Alabama 1940, Recompiled 1958, nor the general provisions relating to the Business and Occupational License Taxes on the state and county level, namely, Section 450 and Section 831, as amended, et seq., Code of Alabama 1940, Recompiled 1958, require in any place or respect that a permit be procured before any of said business and professional licenses can be paid, or before any of the businesses taxed can be engaged in in this state. As stated before, they have been very clearly held to be license taxes levied on the doing of business, and become due after the business has been engaged in in this state. They are not entrance fees or licenses giving the licensee permission to do a certain thing or perform a certain act.

The Appellant could go into quite an amount of detail in distinguishing the facts, as well as the taxing statutes involved in **Nippert, Freeman v. Hewit, Memphis Steam Laundry v. Stone, Railway Express Agency v. Virginia, West Point Grocery Company v. Opelika**, and other like cases, from the particular facts and the specific statute involved in the case at bar. However, space and the rules will not permit, nor do we deem this necessary as this court is very familiar and conversant with all of these cases.

We will point out that the tax in **Freeman v. Hewitt** was a gross receipts tax on sales. (329 U.S. at 250 and 251). The sales in that case were held to be exclusively in interstate commerce, thus the tax to be so directed.

The tax in **Memphis Steam Laundry Cleaners v. Stone** (342 U.S. at 425), was a license tax on "each person soliciting business for a laundry not licensed in this state (Mississippi) * * *" The tax in **Railway Express Agency v. Commonwealth**

of Virginia, was also held under the particular facts of that case (347 U.S. at pages 359 and 360) to be a tax laid directly on interstate commerce and invalid as such. Virginia was said to have a constitutional provision forbidding a foreign corporation from exercising any public service powers or functions in that state. The tax involved was said to be a license tax on the gross receipts earned in the state "on business passing through, into or out of this state (Virginia)." Because of such constitutional prohibition, all purely local or interstate business was done by a separate corporation (a domestic corporation and local subsidiary). Thus, it was said that Railway Express was engaged (like Spector Motor Service, 340 U.S. 602), insofar as Virginia was concerned, strictly in interstate commerce, and the license tax involved as so directed to be in conflict with the Commerce Clause. In West Point Grocery Company v. Opelika, 340 U.S. 390, the grocery company's agents solicited orders for groceries in Opelika, Alabama, and took the orders back to be accepted and filled in West Point, Georgia, and delivered the groceries so ordered upon their subsequent return. Thus the case was said to involve the solicitation of orders for sales made solely in interstate commerce.

The crux of the decisions in Nippert, Hewit and Memphis Steam Cleaners, and West Point Grocery Company was that the taxing statutes involved imposed taxes whose incidences were laid directly on "solicitations" or sales in interstate commerce, and thus were laid directly on interstate commerce. The license tax involved in Railway Express Agency was held to be invalid as being laid directly on the gross receipts which Railway Express derived from its purely interstate business.

Said cases then are all said to involve taxes levied directly on interstate commerce. They differ materially from the cases where taxes have been upheld by this court as having been levied or laid on events taking place within the taxing state or local activities, which can be reasonably separated from the interstate activities.

Caskey Baking Company v. Commonwealth of Virginia, 313 U.S. 117, 119, 61 S.Ct. 881, 882, and cases cited under Footnote No. 3.

Memphis Natural Gas v. Stone, 335 U.S. 80, 68 S.Ct. 1475, 1477, 1478 and cases cited.

Spector Motor Services v. O'Connor, 340 U.S. 602, at page 608, 71 S.Ct. 508, at page 512.

Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546.

General Trading Company v. State Tax Commission, 322 U.S. 335, 64 S.Ct. 1028.

State of Alaska v. Artic Maid, 366 U.S. 199, 81 S.Ct. 928.

General Motors Corporation v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 1571; among a number of other cases to the same effect.

The fact that Section 569 of Title 51 of the Alabama Code of 1940, Recompiled 1958, levies only a license tax on the doing of business in this state, or that the License Tax Code of the State of Alabama, of which Section 569 is a part, applies only to such taxes, and in no respect requires fees for the entry of licensees into this state, or a permit before engaging in such businesses, is so apparent from the statutes themselves that we do not believe that any further comment is necessary. We have, however, discussed this particular point in detail already in this brief, as well as having already cited authorities holding that these license taxes are not entrance fees or permits, but are merely taxes on the doing of business in this state, so we will not repeat them here. See Sun Flower Lumber Company v. Turner Supply Company, 158 Ala. 191, 48 So. 510, at page 511, etc.

4.

THE QUESTION POSED BY THE APPELLANT HAS ALREADY BEEN DETERMINED BY THIS COURT.

Caskey Baking Compahy v. Commonwealth of Virginia, 313 U.S. 117, 119, 61 S.Ct. 881, 882, under Footnote No. 3.

Memphis Natural Gas v. Stone, 335 U.S. 80, 68 S.Ct. 1475, 1477, 1478 and cases cited.

Spector Motor Services v. O'Connor, 340 U.S. 602, at page 608, 71 S.Ct. 508, at page 512.

Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546.

General Trading Company v. State Tax Commission, 322 U.S. 335, 64 S.Ct. 1028.

State of Alaska v. Artic Maid, 366 U.S. 199, 81 S.Ct. 928.

General Motors Corporation v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 1571; among a number of other cases to the same effect.

5.

THE LICENSE TAX ON TRANSIENT PHOTOGRAPHERS APPLIES TO ALL SUCH PHOTOGRAPHERS, WHETHER THEY COME FROM WITHIN OR WITHOUT THE STATE OF ALABAMA, AND NO PREFERENTIAL TREATMENT IS SHOWN UNDER THIS LICENSE TAX STATUTE TO THOSE WHO COME FROM WITHIN THE STATE. IT IS APPLIED EQUALLY TO ALL TRANSIENT PHOTOGRAPHERS.

The annual state license tax on photographers following their profession at a fixed location or place of business in this state has nothing whatsoever to do with the license levied by the Legislature on transient or traveling photographers.

The levy on transient or traveling photographers is complete within itself.

"For each transient or traveling photographer, five dollars per week."

The above quoted levy and license tax is entirely separate and distinct from the levy on photographers doing business at a fixed location in this state, as a reading of Title 51, Section 569, Code of Alabama 1940, Recompiled 1958, will clearly show.

The license taxes imposed by Section 569 of one amount on photographers who have a fixed location in this state and a different amount on transient or traveling photographers have been held by the Supreme Court of Alabama to be two separate and distinct levies and the difference in the amount of the two levies not to constitute an inherent discrimination, but to the contrary to be based upon a reasonable classification of photographers. **Graves v. State**, 258 Ala. 359, 62 So.(2d) 446, at page 448. See also **Finley v. State**, 37 Ala. App. 555, 72 So.(2d) 135.

"No 'iron rule of equality' between taxes laid by a State on different types of business is necessary. **Caskey Baking Co. v. Commonwealth of Virginia**, 313 U.S. 117, 119-121, 61 S.Ct. 881, 882-883, 85 L.Ed. 1223; **Morf v. Bingaman**, 298 U.S. 407, 414, 56 S.Ct. 756, 80 L.Ed. 1245; **Capitol Greyhound Lines v. Brice**, 339 U.S. 542, 546-547, 70 S.Ct. 806, 808-809, 94 L.Ed. 1053."

State of Alaska v. Artic Maid, 366 U.S. 199, at page 205, 81 S.Ct. 933, at page 932.

This court on numerous occasions has also recognized the rights of the states to set up proper classifications, and even sub-classifications, for the purpose of levying state taxes, and for the purpose of fixing different amounts for such purpose. This court has also upheld such classifications or sub-classifications wherein there is any reasonable grounds or basis to make such differences or separate classifications. See **Carmichael v. Southern Coke and Coal Company**, 301 U.S. 495, 57 S.Ct. 868, **Clark v. Paul E. Gray, Inc.**, 306 U.S. 583, 594, 59

S.Ct. 744, 750, 751, Caskey Baking Company v. Commonwealth of Virginia, 313 U.S. 117, pages 120 and 121, 61 S.Ct. 881, at page 883.

The Alabama Supreme Court also in the Graves case (62 So.(2d) at pages 448 and 449), and in the Haden case, and in this case, has recognized, and in effect has held, that the license tax on transient or traveling photographers is levied on transient photographers, whether they come from within or without the state, and that "transient or traveling" photographers can be properly classified for the purpose of the tax, separate and distinct from photographers having a photograph gallery or fixed location.

And as we understand it, the taxing power of a state is not to be regarded as having been exercised in an unconstitutional manner where the levy is non-discriminatory in character, does not materially impede the commerce, and is not subject to local levy in some other sovereignty. State of Alaska v. Artic Maid, 366 U.S. 199, 81 S.Ct. 929, Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546, Cloverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604, 58 S.Ct. 736, among others.

The state has also always applied this license tax to all photographers who travel from county to county in this state taking pictures, regardless of whether they are Alabama residents, and their activities originate in this state, or whether they come from without the state. There is absolutely no evidence in this case that there has been any discrimination.

6.

WE ARE THE FIRST TO AGREE THAT INTERSTATE COMMERCE CANNOT BE LICENSED BY THE STATES. HOWEVER, THE TAX IN THIS CASE IS NOT DIRECTED AT INTERSTATE COMMERCE, BUT HAS BEEN CLEARLY HELD TO BE DIRECTED AT LOCAL ACTIVITIES TAKING PLACE WITHIN THIS STATE.

The license tax here under facts very similar to the facts involved in this case has been repeatedly held not to be directed at solicitors or sales in interstate commerce, or on interstate commerce itself. To the contrary it has continuously been held to be directed only at local activities taking place within the boundries of this state. **Graves v. State**, 258 Ala. 359, 62 So.(2d) 446; **Haden v. Olan Mills**, 273 Ala. 129, 135 So.(2d) 338; **Olan Mills, Inc. of Tennessee v. City of Opelika, Alabama, et al**, 207 F. Supp. 332 (1962).

7.

THE GREAT MAJORITY OF CASES OF THIS COURT RELEVANT TO THE SUBJECT MATTER WOULD SUSTAIN THIS LICENSE TAX AS HELD TO BE DIRECTED AT LOCAL ACTIVITIES TAKING PLACE WITHIN THE TAXING STATE.

The federal cases most cited and insisted upon by the Appellant, namely, the **Nippert** case, 327 U.S. 416, **Spector Motor Service, Inc. v. O'Connor**, 304 U.S. 602, **Railway Express Agency, Inc. v. Commonwealth of Virginia**, 347 U.S. 359, and **West Point Grocery Company v. Opelika**, 354 U.S. 390, have all been discussed in detail and clearly distinguished from the case at bar from the standpoint of the law and the facts in at least two instances in this brief, so we believe that that will suffice to show the facts of those cases to be entirely different from the facts of this case, and that the doctrines of those cases not to be applicable or relevant to the situation here.

The above is also true as to the state court cases which the Appellant has also cited and discussed. Those cases also all involve different facts or different statutes and taxes which were held to be levied on or directed at solicitations or selling. In fact the Supreme Court of Alabama has in both the Graves case (62 So.(2d), at pages 449 and 450) and in the **Haden** case (135 So.(2d), at pages 389 and 390), very clearly distinguished those cases from the facts and circumstances here involved.

Actually the case of **Commonwealth v. Olan Mills, Inc.**, 196 Va. 898, 86 S.E.(2d) 27, is the only case cited by the Appellant in this respect which might be said to have any material identity in fact or similarity in statute.

However, in said **Olan Mills, Inc.** case there is a very serious difference:

> "McCarter, the individual here charged, was not even a cameraman; he was a solicitor."
> (Emphasis Supplied)

86 S.E. at page 29.

This alone seems to make said **Olan Mills, Inc.** case (86 S.E.(2d) 27), fall within the scope of the other cases cited by the Appellant, which turn on the fact that the taxing statutes involved therein were either held to be directed at "solicitations" or at sales made in interstate commerce.

In said Virginia case the Virginia Court construed the Virginia statute ("as it had a right to do") entirely differently from the way that the Alabama court has repeatedly construed the Alabama statute involved (Title 51, Section 569, supra). That is, the Alabama court has repeatedly held the Alabama License Tax on "traveling and transient photographers" to be directed at the conduct of such photographers in this state in conducting the sittings and taking the pictures, regardless of whether the photographer comes from within the state or from without the state. Cases upholding the license tax as so directed, and considering it to be a tax on local activities, which can be reasonably separated from the interstate activities, in addition to the holding of the Alabama court in this case are:

Graves v. State, 258 Ala. 539, 62 So.(2d) 446 (1953).

Haden v. Olan Mills, Inc., 273 Ala. 129, 135 So.(2d) 388 (1961).

Olan Mills, Inc. of Tennessee v. City of Opelika, Alabama, et al., 207 F. Supp. 332 (1962).

Lucas v. City of Charlotte (4th Cir.) 86 F.(2d) 394, 109 A.L.R. 297.

Craig v. Mills, 203 Miss. 692, 33 So.(2d) 801.

The cases cited by the Virginia court in its decision in Commonwealth v. Olan Mills, Inc. (86 S.E. 27) were the Nippert case (327 U.S. 416), Memphis Steam Laundry Cleaners (342 U.S. 389), and other cases where the taxes involved were said to be laid mainly on "solicitations" or interstate sales.

The record in this case shows that the orders were procured and solicitations made, not by the employees of the Appellant, Dunbar-Stanley, Inc., but by the local employees of the J. C. Penney Stores located in Alabama. Moreover, the Alabama court in its opinion in this case (Appendix, page 39, et seq.), so found:

> "We do not find anywhere in the record that the photographer took orders for the pictures. This was done, as we have stated, by Penney employees and mailed to Appellant for acceptance."
>
> (Emphasis Supplied)

As indicated by the record in this case, Appellant prices its photographs at fifty-nine cents apiece. It is small wonder that Appellant operates in some 47 or 48 states, etc. Appellant does not pay its way. Other transient photographers cannot compete.

The facts of this case do not conform with the holding of the United District Court for New Mexico in the Dunbar-Stanley case there involved. The statute there involved was said to be directed at sales consummated in interstate commerce. The same is also true in regard to the opinion in Commonwealth of Virginia v. Olan Mills, Inc., 196 Va. 898, 86 S.E.(2d) 27. Those cases do not even consider, and entirely ignore, the decisions of this court in Caskey Baking Company v. Commonwealth of Virginia, 313 U.S. 117, 119, 120, 61 S.Ct. 881, 882, 883, and the other cases cited and referred to by us upholding taxes under the Commerce Clause, where directed at local activities.

This would also include the pronouncements of this court even in Spector Motor Service v. O'Connor, 340 U.S. 602, at 608, which expressly exclude from the doctrine of that case taxes directed at local activities, or where both intrastate and interstate commerce is involved.

The facts of this case undisputedly show that local employees of the J. C. Penney stores in this state, handled the advertising, solicited the orders for the photograph, and arranged the sittings, and also collected the money from the customers. Penney deducted fifteen percent in each case for its fee, and sent the rest to the Appellant. Penney also delivered the photographs when finished to the customers. All of these activities also took place solely within this state. No solicitations were made in this state by employees of the Appellant.

At the appointed time, and in the several Penney stores involved, the Appellant's traveling or transient photographers appeared and conducted the sittings and took the pictures or exposures. Such local activities on the part of the Appellant's photographers is the local event at which the Alabama Court has repeatedly held that the license tax involved is directed, and the thing which it hits.

> "While the transportation of the bread over the State line is interstate commerce, that is not the activity which is licensed or taxed. The purely local business of peddling is what the tax hits, and this irrespective of the source of the goods sold. It is settled that such a statute imposes no burden upon interstate commerce which the Constitution interdicts. (citing cases in support thereof under footnote "3")."
>
> (Emphasis Supplied)

Caskey Baking Company v. Commonwealth of Virginia, supra, 313 U.S. at 119, 61 S.Ct. at pages 882 and 883.

See also State of Alaska v. Artic Maid, 366 U.S. 199, 81 S.Ct. 929.

Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546.

Not all state taxation is to be condemned simply because in some manner it affects interstate commerce.

McGoldrick v. Berwind-White Coal Company, 309 U.S. 33, 60 S.Ct. 388.

Postal Telegraph and Cable Co. v. Richmond, 249 U.S. 252, 39 S.Ct. 265.

CONCLUSION

The Appellant's use of the term "fractionalized" in this case is pure nomenclature and is actually nothing more than a high sounding label. In the light of the facts (which are said to be of utmost importance in this type of case) the term is without substance.

The Legislature has only sought in enacting the taxing statute to tax all "transient or traveling" photographers, who go from county to county, wherein they have no fixed place of business, and wherein they follow their profession. It matters not whether they come from within or without the state, under such circumstances the tax is applied equally to all transient or traveling photographers. The tax has been repeatedly so characterized by the Alabama court, and said to be directed at local activities taking place in this state. Moreover, there is no evidence in this case that the tax as so levied discriminates against interstate commerce, or that it places an undue burden on such commerce, or that the tax as so directed could be lawfully duplicated by any other state.

The foregoing being considered, it clearly appears that the decisions of the courts below in upholding the validity of the tax and the assessment should be affirmed by this Honorable Court.

Respectfully submitted.

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PROOF OF SERVICE

I, William H. Burton, of Counsel for the Appellee, hereby certify that I have served a copy of the foregoing brief in behalf of the Appellee on Honorable J. Edgar Thornton, P. O. Box 23, Mobile, Alabama, 36601, and Honorable Glen B. Hardman, 1210 North Carolina National Bank Building, Charlotte, North Carolina, 28202, as Attorneys for the Appellant, by mailing copies thereof to them by first class United States mail, postage prepaid, and to their respective addresses, on this the 19th day of December, 1968.

Wm. H. Burton

WILLIAM H. BURTON,
Of Counsel for the Appellee

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 376.

DUNBAR-STANLEY STUDIOS, INC., a Corporation,
Appellant,

versus

STATE OF ALABAMA,
Appellee.

REPLY BRIEF ON BEHALF OF APPELLANT.

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STATE OF ALABAMA,
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REPLY BRIEF ON BEHALF OF APPELLANT.

As we understand it, the State answers taxpayer's argument in this case by saying:

1. The tax here involved is not a "license".

Taxpayer's reply: We demur to this argument, and then take issue with it.

2. Taxpayer has misstated the Record in Brief by saying that Taxpayer "solicits" orders for baby pictures, for the Record shows that only Penney solicits such orders.

Taxpayer's reply: We also demur to this, and then take issue.

3. Taxpayer has sought to "prejudice" this case by noting a connection with the City case.

Taxpayer's reply: Demurrer and general issue.

4. The great majority of cases involving licenses on photographers have held they do not violate the Commerce Clause.

Taxpayer's reply: The facts are the exact opposite.

The State also makes vague assertions about:

1. The state court's construction of state taxes is binding, and

2. The license applying to all is not discriminatory.

The remainder of the State's Answer to our argument is too elusive for us to grasp.

To begin at the end and work backward, of course the state court identifies and applies the incidence of a state tax, and in the case at bar, it said that mere exposing film was the business of photography, and the license here applied to it. We have never said otherwise. The question in this Court is whether or not this violates the Commerce Clause.

The observation that this license is non-discriminatory completely overlooks the facts:

1. That taxpayer operates at a fixed location [Penney stores].

2. Because the film [not the photographer] goes out of State, the transient weekly license applies rather than the yearly license.

3. In this very case this construction of this license doubles the amount due for taxpayer's operations in Birmingham.

D

This construction by the State Court of this license makes it discriminatory because of interstate activity. If the State has any answer to this, we have not discerned it.

I.

THE TAX HERE INVOLVED IS NOT A "LICENSE".

Of course, the nature of an involuntary exaction by a sovereign must be determined by its operation rather than by the particular descriptive language which may be applied to it.

> **Educational Films Corp. v. Ward**, 282 U. S. 379, 387 (1931).

Hence, it really does not matter what this tax is called.

It is perfectly clear that by the statutes of Alabama before one can engage in a business requiring a license, he must purchase such license.

> Tit. 51, Code of Ala., Sec. 831 (Appellant's Brief, pp. 4, 5).

The effect of the license is to confer on the licensee a personal privilege to engage in such business.

> Tit. 51, op. cit., Sec. 840 (Appellant's Brief, p. 4).

A transient photographer is required to obtain a license.

> Tit. 51, op. cit., Sec. 569 (Appellant's Brief, p. 2).

If this does not make the exaction sought of Taxpayer a license, we do not know what it does make of it. And regardless of what it is called, it is an admission fee charged before Taxpayer can engage in business in Alabama. If Taxpayer is engaged in interstate commerce (as we insist and the State does not deny), we arrive at precisely where we were when we called this a license, namely, may the State require an involuntary exaction of one before he can engage in interstate commerce?

II.

TAXPAYER HAS FALSELY REPRESENTED THAT IT SOLICITS INTERSTATE BUSINESS.

The actual facts here are

1. Penney decides when Taxpayer may come into the various stores. The cards introduced into evidence, but not reproduced in the Appendix, show this. It is a written record of visits.

But this does not mean that Taxpayer does not influence these dates. Taxpayer seldom sends more than one photographer at a time into the State. It has happened, but it is frowned on by Taxpayer. So when a photographer comes into the State, it is desirable that he or she cover the entire State before leaving.

Hence, the representation by Taxpayer, and the finding by the lower courts, that Penney chooses the time for visits is not false. But Taxpayer significantly influences the dates of these visits.

2. Taxpayer prepares direct mail advertising of visits. The lists used by Taxpayer belong to Taxpayer, and they are kept as current as possible. The mail is submitted to Penney for checking, as to deaths, departures, etc. The local managers of Penney are expected to check these lists. Actualy, they seldom do. Penney puts postage on the advertising and mails it.

Question: Who solicits those sales? Taxpayer or Penney?

3. Penney runs an advertisement in the local newspaper, a copy of which is in the Record in this case but not reproduced in the Appendix. It sets out dates of the visit. Its form and content were prepared by Taxpayer. As a

result of these efforts, customers come in and have pictures taken, and order prints.

Question: Who solicits those sales?

4. Taxpayer's photographers are instructed to come in, fill out order blanks, pose the children, take the pictures, return exposed film to Charlotte, and move on to the next town. These photographers claim to have, and evidence, special ability in handling children. No photographer has ever been prohibited from soliciting orders directly for photographs of children. Actually there are differences between the photographers as to their ability to get business. Since Taxpayer, Penney and the photographer are all compensated on a percentage basis, everyone is anxious to increase the volume of this business. However, these experts with children are not **required** to drum up the business they do. Their expertness runs along other lines. This is why an effort is made to make it as easy for them as possible with the pre-visit advertising done by Penney, even though the copy is furnished by Taxpayer.

It has been clear in this case from the very first day it began that the State would prevail if, but only if, Taxpayer's local activities were sufficient to license. The State has never claimed the right to tax Taxpayer's activities in North Carolina, or even all of Taxpayer's activities. The question has been as to taxing Taxpayer's activities in Alabama.

Obviously, the more local activities engaged in by Taxpayer, the more likely the State will win. Hence, it is apparent that the State will want to find more and more local activities on which to hang this tax. Taxpayer will want to have less and less local activity.

It has not been the purpose of Taxpayer to assist the State in winning this case. We have assumed that the State can take care of itself, and it has been completely

successful up to this time. However, when we commenced characterizing the facts set out above, we simply could not in good faith deny that in addition to exposing film in Alabama, Taxpayer might also have been thought to have solicited orders for sales. We took this as being on our part an admission against interest. It put even a more pronounced local activity into Taxpayer's actions than we had set out in our Bill of Complaint. We had thought that the State would emphasize our local activities, and even bring out these matters noted here, which have never been denied by Taxpayer.

Instead, and for reasons which have completely escaped us, the State has become adamant and intransigent in its insistence that Taxpayer has **not** solicited orders for sales of baby pictures in Alabama. We have never admitted this, for we know that some photographers have solicited orders, and it could be said that by furnishing advertising copy, this constituted solicitation. But we have not wanted to make an issue of this. We think it is to the State's advantage to saddle solicitation on Taxpayer, and not to our advantage to insist on it.

Interestingly enough, the Supreme Court of Alabama took what it understood to be the State's position in this matter and expressly found as a fact that the Taxpayer does not solicit. Even so, we could not represent to this Court that Taxpayer has never solicited orders for sales, for we know that it has, and the inference to be drawn from the other facts might be construed as Taxpayer action.

Now the State is upset in Brief because we stated the truth to this Court. Our response is, so be it. If the State, against its own interest, wants to estop us from stating the truth, we certainly should not object. Hence, the question will become whether or not a foreign photographer who solicits no orders but exposes film only for

processing across state lines may be licensed? We think not for the reasons set out in our Brief.

The addition of the solicitation will not, in our judgment, affect the result in this case. It may tend to further localize the activity. But the cases in our Brief show that solicitation of orders for sales across state lines may not be licensed.

See **West Point Grocery Co. v. Opelika**, 354 U. S. 390 (1957).

Hence, we think this is a tempest in a tea pot. We have represented the truth. The State is not satisfied with it. Under either alternative this license can't stand. Therefore, we will not take up more space on this.

III.

TAXPAYER WRONGFULLY ASSOCIATES THIS CASE WITH THE CITY CASE WHERE THE LICENSE WAS DISCRIMINATORY.

The facts here connect these two cases. Nothing we can do or say will separate or join them. Three years open operation in eight cities in Alabama by Taxpayer was not sufficient to catch the eye of the State. As soon as the City attacked Taxpayer, the State found Taxpayer. But the State was not satisfied with the current license. The State wanted to punish Taxpayer for not anticipating that the state courts would sustain this tax. The State cannot represent to this Court that it always imposes escape licenses where it finds taxpayers who have failed or refused to take out a license. But this was the treatment Taxpayer received in this case.

These facts speak more eloquently than we can. If this "prejudices" this case in this Court, it is the usual sort of prejudice which holds parties responsible for the consequences of their acts.

IV.

THE GREAT WEIGHT OF AUTHORITY HOLDS LICENSES SIMILAR TO THE ONE HERE NOT IN VIOLATION OF THE COMMERCE CLAUSE.

We argued this in the Jurisdictional Statement filed in this cause. To our surprise, the State now argues otherwise. The only cases cited by the State, and the only cases we have found sustaining a tax similar to the one in the case at bar, besides the Alabama cases, are

Lucas v. City of Charlotte, 86 F. 2d 394 (C. A. 4th, 1936);

Craig v. Mills, 203 Miss. 692, 33 So. 2d 801 (1948).

We do not believe that this puts three jurisdictions in this column. But regardless of this, the cases holding that this activity is interstate commerce and not subject to state licensing under the Commerce Clause are

Nicholson v. Forrest City, 216 Ark. 808, 228 S. W. 2d 53 (1950);

Olan Mills v. Tallahassee, 100 So. 2d 164 (Fla. 1958), cert. den. 359 U. S. 924;

Graves v. Gainesville, 78 Ga. App. 186, 51 S. E. 2d 58 (1958);

Bossert v. Okmulgee, 97 Okla. Crim. 140, 260 P. 2d 429 (1953);

Olan Mills v. Kingtree, 236 S. C. 535, 115 E. 2d 52 (1960);

Com. v. Olan Mills, 196 Va. 898, 86 S. E. 2d 58 (1958).

Taxpayer litigated over the New Mexico license as applied to Taxpayer's activities, which are the same as Taxpayer's activities in Alabama and throughout the country, in a three-judge federal district court in a case styled **Dunbar Stanley Studios v. Breen**, which was not reported, but is set out in the Appendix to the Jurisdictional Statement in this case.

We would say, using the State's terminology, that the "great majority of the cases" are contrary to the position of the Supreme Court of Alabama in this case.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 376.—October Term, 1968.

Dunbar-Stanley Studios, Inc., Appellant, v. State of Alabama. } On Appeal From the Supreme Court of Alabama.

[February 25, 1969.]

Mr. Justice Fortas delivered the opinion of the Court.

Alabama levies a tax upon photograph galleries and persons engaged in photography. If the business is conducted "at a fixed location," the tax in the large cities[1] is $25 a year for each county, town, or city. For each "transient or traveling photographer," the tax is $5 per week for each county, town, or city in which he plies his trade.[2]

This case involves state assessments of the transient photographers tax against appellant and its predecessor partnership.[3] Appellant sought a declaration from the state courts that the assessment was improper, claiming

[1] For smaller towns, the rate is stepped down. The lowest rate is $3 a year for localities with fewer than 1,000 inhabitants.

[2] Title 51, Code of Alabama § 569, reads as follows:

"Photographers and photograph galleries. Every photograph gallery, or person engaged in photography, when the business is conducted at a fixed location: In cities and towns of seventy-five thousand inhabitants and over, twenty-five dollars; in cities and towns of less than seventy-five thousand and not less than forty thousand inhabitants, fifteen dollars; in cities and towns of less than forty thousand and not less than seven thousand inhabitants, ten dollars; in cities and towns of less than seven thousand and over one thousand inhabitants, five dollars; in all other places whether incorporated or not, three dollars. The payment of the license required in this section shall authorize the doing of business only in the town, city or country where paid. For each transient or traveling photographer, five dollars per week."

[3] No point has been made as to the identity of the taxpayer or its liability for the tax if it may be constitutionally levied.

that the tax was levied upon interstate commerce, in conflict with the Commerce Clause of the Constitution. The Supreme Court of Alabama sustained the tax. — Ala. —, 210 So. 2d 696 (1968). We affirm.

Appellant is a photography firm specialising in selling photographs of children. It is organized as a North Carolina corporation and its principal office and processing plant are in Charlotte, North Carolina. It has no office or place of business in Alabama, nor does it maintain an inventory there. Its activities in that State stem from a contract between appellant and J. C. Penney Company. Penney operates department stores in eight cities in Alabama, as well as elsewhere in the Nation. By the terms of the contract, as summarized in the complaint, appellant's photographers, nonresidents of Alabama, "were at the disposal of the local Penney stores. The local store manager requested appellant to send representatives for picture taking on specified dates." During the period for which the tax has been assessed, appellant's photographers were sent to J. C. Penney stores in eight Alabama cities. According to the complaint, each visit lasted two to five days, and each city was visited from one to five times a year.

The Penney stores advertised the photographic service, inviting parents to bring their children to be photographed during the visit by appellant's photographer. Each store took orders for the photographs, arranged the time for the sitting, provided a place in the store for the temporary studio, collected the money, and delivered the pictures to the customer when completed. Appellant was paid a percentage of the receipts from the Penney stores.

Appellant's activities were limited to taking the pictures, transmitting the exposed film to its office in North Carolina where it was developed, printed, and finished, and mailing the finished prints to the Penney store in Alabama.

It is clear from the taxing statute itself and from the decisions of the Supreme Court of Alabama that the tax is laid upon the distinctive business of the photographer, not upon the soliciting of orders or the processing of film. *Graves* v. *State*, 258 Ala. 359, 62 So. 2d 446 (1953); *Haden* v. *Olan Mills, Inc.*, 273 Ala. 129, 135 So. 2d 388 (1961). Appellant argues that since each of its photographers came into Alabama from North Carolina to ply his trade, bringing his equipment with him, and since he merely exposed his film in Alabama, the developing, printing, and finishing operation being conducted in North Carolina, his activities in Alabama are an inseparable part of interstate commerce and cannot constitutionally be subject to the Alabama license tax. Appellant relies upon familiar cases decided by this Court holding that the Commerce Clause precludes a state-imposed flat sum privilege tax on an interstate enterprise whose only contact with the taxing State is the solicitation of orders and the subsequent delivery of merchandise within the taxing State. *West Point Wholesale Grocery Co.* v. *Opelika*, 354 U. S. 390 (1957); *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U. S. 389 (1952); *Nippert* v. *City of Richmond*, 327 U. S. 416 (1946). Such taxes have a substantial inhibitory effect on commerce which is essentially interstate.

But these cases are not applicable to the present facts. In determining whether a state tax imposes an impermissible burden on interstate commerce, the issue is whether the local activity which is made the nominal subject of the tax is "such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it." *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 166 (1954). If, for example, a license tax were imposed on the acts of engaging in soliciting orders or making deliveries, conflict with the Commerce Clause would be evident because these are minimal activities within a State without which

there can be no interstate commerce. But in the present case, the "taxable event," as defined by the State's courts, is "pursu[ing] the art of photography in Alabama." *Graves* v. *State*, 258 Ala. 359, 362, 62 So. 2d 446, 448. When appellant's photographers set up their equipment in the local stores, posed the children brought to them to be photographed, and operated their cameras, they were engaged in an essentially local activity: the business of providing photographers' services. The essentially local character of the activity is emphasized by the intimate connection between appellant's photographers and the local stores in which they set up their temporary studios. Engaging in such local business may constitutionally be made subject to local taxation. *E. g.*, *Alaska* v. *Arctic Maid*, 366 U. S. 199 (1961).

It could hardly be suggested that if J. C. Penney had set up its own resident or transient photography studios, using its own employees, such a photography business would have been exempt from state licensing merely because it chose to send the exposed film out of the State for processing. The extraction of a natural resource within a State is not immunized from state taxation merely because, once extracted, the product will immediately be shipped out of the State for processing and sale to consumers. *Alaska* v. *Arctic Maid*, *supra*, at 203–204; *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172, 177–179 (1923). Cf. *Toomer* v. *Witsell*, 334 U. S. 385, 394–395 (1948). *A fortiori*, the fact than an intermediate processing stage takes place outside the State before the pictures are returned to the State for final delivery does not make the taking of the pictures—the activity on which the tax was imposed—so inseparable a part of the flow of interstate commerce as to be immune from state license taxation. The mere substitution for J. C. Penney's own employees of a transient photographer who comes into Alabama from North

Carolina does not convert the essentially local activity of photographing the subjects into an interstate activity immune from the state privilege tax. Cf. *Caskey Baking Co.* v. *Virginia*, 313 U. S. 117 (1941); *Wagner* v. *City of Covington*, 251 U. S. 95 (1919).

Nor is the tax invalid as a discrimination against interstate commerce. Alabama's tax is levied equally upon all transient or traveling photographers whether their travel is interstate or entirely within the State. On the record before us, there is no basis for concluding that the $5 per week tax on transient out-of-state photographers is so disproportionate to the tax imposed on photographers with a fixed location [4] as to bear unfairly on the former. Cf. *West Point Wholesale Grocery Co.* v. *Opelika*, 354 U. S. 390 (1957); *Best & Co.* v. *Maxwell*, 311 U. S. 454 (1940). In none of the cities for which appellant's complaint gives the details of its activities would the transient tax imposed on it have exceeded that which a fixed-location photographer would have had to pay to operate in the city.[5] For example, in 1965, five visits are listed to Mobile, resulting in an assessed tax of $25. This is equal to the flat rate tax which a photographer permanently located in the city would have had to pay. Since, according to the complaint, the maximum tax on appellant in any year for any city would be $25,[6] the burden could hardly be prohibitive.

Affirmed.

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[4] See n. 1, *supra*.

[5] Appellant asserts in his brief—but not in the complaint—that the taxes assessed for its operations in Birmingham were almost twice what a fixed-location photographer would have had to pay for the same period. Even assuming that to be true, we are not prepared to say that this relative burden is improper, given the differences between the two ways of carrying on the business.

[6] Allegedly, there were up to five visits per year to each city, each visit extending from two to five days. The tax rate for transient photographer was $5 for each week of operation in a locality.

SUPREME COURT OF THE UNITED STATES

No. 376.—October Term, 1968.

Dunbar-Stanley Studios, Inc., Appellant, *v.* State of Alabama.	On Appeal From the Supreme Court of Alabama.

[February 25, 1969.]

Mr. Justice White, concurring.

Alabama taxes its transient photographers on a different, and often more burdensome, basis than those not in that category. If firms operating precisely as appellant does, and mailing their film to a central point within the State for development, are taxed as transient photographers then there is no unconstitutional discrimination against interstate commerce. But if appellant is taxed as a transient photographer because its films are sent for development across a state line, then there is discrimination against interstate commerce. Although appellant contends that it is because of the interstate shipment of films that the transient tax was applied, and although the decision in *Haden* v. *Olan Mills, Inc.*, 273 Ala. 129, 135 So. 2d 388 (1961), arguably supports that view, I do not think that a sufficient showing has been made in this record that Alabama has so applied its tax. Since the burden of proof is on the appellant here, I join the Court despite the uncertainty of the record on this score.